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

16 SIERRA NEVADA FOREST PROTECTION)
CAMPAIGN, CENTER FOR BIOLOGICAL)
17 DIVERSITY, NATURAL RESOURCES)
DEFENSE COUNCIL, SIERRA CLUB, and)
18 THE WILDERNESS SOCIETY, non-profit)
organizations,)

19 Plaintiffs,)
20

21 v.)

22 MARK REY, in his official capacity as Under)
Secretary of Agriculture; DALE BOSWORTH,)
in his official capacity as Chief of the United)
23 States Forest Service; JACK BLACKWELL,)
in his official capacity as Regional Forester,)
24 Region 5, United States Forest Service; and)
JAMES M. PEÑA, in his official capacity as)
25 Forest Supervisor, Plumas National Forest,)

26 Federal Defendants.)
27

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

**FEDERAL DEFENDANTS'
MEMORANDUM IN SUPPORT OF
MOTION TO CONSOLIDATE CASES**

Date: July 25, 2005
Time: 9:00 a.m.
Location: 15th Floor
Courtroom No. 3
Hon. Morrison C. England, Jr.

28 ///

1 PEOPLE OF THE STATE OF CALIFORNIA,
2 ex rel. BILL LOCKYER, Attorney General,

3 Plaintiff,

4 v.

5 UNITED STATES DEPARTMENT OF
6 AGRICULTURE; MIKE JOHANNNS, in his
7 official capacity as Secretary of the
8 Department of Agriculture;
9 MARK REY, in his official capacity as
10 Under Secretary of Agriculture;
11 DALE BOSWORTH, in his official capacity
12 as Chief of the United States Forest Service;
13 and JACK A. BLACKWELL in his official
14 capacity as Regional Forester, Region 5,
15 United States Forest Service,

16 Federal Defendants.

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20 CALIFORNIA FORESTRY ASSOCIATION
21 and AMERICAN FOREST & PAPER
22 ASSOCIATION,

23 Plaintiffs,

24 v.

25 DALE BOSWORTH, Chief, United States
26 Forest Service; MIKE JOHANNNS, Secretary of
27 Agriculture; and JACK A. BLACKWELL,
28 Regional Forester, Pacific Southwest Region,
United States Forest Service,

Federal Defendants.

PACIFIC RIVERS COUNCIL,

Plaintiff,

v.

UNITED STATES FOREST SERVICE;
MARK REY, in his official capacity as Under
Secretary of Agriculture; DALE BOSWORTH,
in his official capacity as Chief of the United
States Forest Service; JACK BLACKWELL,
in his official capacity as Regional Forester,
Region 5, United States Forest Service

Federal Defendants.

No. CIV-S-05-0211 MCE/GGH

Case No. 2:05-CV-00905-MCE-DAD

Case No. 2:05 CV-00953-WBS-DAD

1 **INTRODUCTION**

2 The United States hereby seeks to consolidate four cases^{1/} currently pending in this
3 judicial district that directly challenge the adequacy of the 2004 Sierra Nevada Forest Plan
4 Amendment, also known as the 2004 Framework, which provides management direction for
5 nearly 11.5 million acres of National Forest System land throughout the Sierra Nevada.
6 Consolidation is appropriate because the cases involve common questions of law and fact. All
7 four cases include challenges under the National Environmental Policy Act (“NEPA”) to the
8 adequacy of the final supplemental environmental impact statement (“FSEIS”) for the 2004
9 Framework, as well as independent claims under the Administrative Procedure Act (“APA”) that
10 the Forest Service’s decision is not adequately supported by reasoning in the record. Two of the
11 cases, Sierra Nevada Forest Protection Campaign v. Rey and California Forestry Association v.
12 Bosworth, raise claims under additional substantive statutes such that consolidation is necessary
13 to ensure consistent outcomes. Additionally, Federal Defendants respectfully submit that
14 consolidation would promote the more effective coordination of briefing and argument for all
15 four challenges to the 2004 Framework and thereby promote judicial economy. For the reasons
16 set forth below, the Court should grant Federal Defendants’ motion and consolidate the cases.

17 **STANDARD OF REVIEW**

18 Rule 42(a) of the Federal Rules of Civil Procedure, which is entitled “Consolidation,”
19 states as follows:

20 When actions involving a common question of law or fact are pending before the
21 court, it may order a joint hearing or trial of any or all the matters in issue in the
22 actions; it may order all the actions consolidated; and it may make such orders
concerning proceedings therein as may tend to avoid unnecessary costs or delay.

23 _____
24 ^{1/} The four cases to be consolidated are: Sierra Nevada Forest Protection Campaign v. Rey, No.
25 CIV-S-05-0205-MCE-GGH (“SNFPC v. Rey”); California ex rel. Lockyer v. U.S. Dep’t of
26 Agric., No. CIV-S-05-0211-MCE-GGH; California Forestry Ass’n v. Bosworth, Case No. 2:05-
27 CV-00905-MCE-DAD; and Pacific Rivers Council v. U.S. Forest Serv., Case No. 2:05-
28 CV-00953- WBS-DAD. Two of these cases, SNFPC v. Rey and Lockyer, have previously been
found by this District Court to be related under LR 83-123(a). Federal Defendants have
separately notified the Court that it appears that California Forestry and Pacific Rivers are also
related.

1 Fed. R. Civ. P. 42(a). District courts have “broad discretion under this rule to consolidate cases
2 pending in the same district,” even if they are before different judges. Investors Research Co. v.
3 U.S. Dist. Court for Cent. Dist. of Calif., 877 F.2d 777 (9th Cir. 1989). The purpose of
4 consolidation is to avoid unnecessary cost or delay in cases involving “claims and issues sharing
5 common aspects of law or fact.” Equal Employment Opportunity Comm’n v. HBE Corp., 135
6 F.3d 543, 550 (8th Cir. 1998). A court may consolidate cases upon motion by the parties or *sua*
7 *sponte*. See In re Adams Apple, Inc., 829 F.2d 1484, 1487 (9th Cir. 1987). In deciding whether
8 it is appropriate to consolidate cases, the court should “weigh[] the saving of time and effort
9 consolidation would produce against any inconvenience, delay, or expense that it would cause.”
10 Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984).

11 ARGUMENT

12 **I. Consolidation is Appropriate Because the Cases Directly Challenge the 2004** 13 **Framework and Involve Common Questions of Law and Fact**

14 As this Court is already aware, the four cases proposed to be consolidated involve direct
15 challenges to the 2004 Framework, which provides management direction for eleven national
16 forests on nearly 11.5 million acres of National Forest System land throughout the Sierra
17 Nevada. As explained below, the four cases involve common questions of law under NEPA and
18 the APA. Additionally, two of the cases, SNFPC v. Rey and California Forestry, contain NFMA
19 claims that could potentially result in inconsistent judgments should they not be consolidated.

20 All four cases challenge the 2004 Framework on the basis that the analysis in the FSEIS
21 accompanying the decision is allegedly inadequate under NEPA and the APA. These claims
22 focus on the same types of issues, specifically effects to wildlife species and consideration of
23 alternatives. As a factual matter, the cases will involve review of the same complex and lengthy
24 key documents^{2/} and require familiarization with the same complex procedural history of

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26
27 ^{2/} The index alone to the parts of the administrative record common to all cases is well over a
28 hundred pages, while the record itself contains over 4,000 pages in hardcopy and several
thousand more on compact disc.

1 management of the national forests in the Sierra. Additionally, the cases will require an
2 understanding of similar biological issues, including wildlife viability and fire and fuels.

3 The NEPA claims in the four cases are based around a common question: the adequacy
4 and legitimacy of the FSEIS's consideration of effects to wildlife species. Plaintiffs in Lockyer
5 allege that the FSEIS failed to provide complete information about the status and effects of
6 various wildlife species, including the California spotted owl, Yosemite toad, and willow
7 flycatcher. Lockyer, Am. Compl. ¶¶ 53-57. The adequacy of the analysis of effects upon the
8 California spotted owl is also at issue in SNFPC v. Rey, as is the analysis of effects upon Pacific
9 fisher and the American marten. SNFPC v. Rey, Am. Compl. ¶¶ 107-115. Similarly, the
10 adequacy of analysis of effects upon aquatic species and amphibians, including Yosemite toad, is
11 at issue in Pacific Rivers, Compl. ¶ 20 (identifying various fishes and amphibians, including
12 Yosemite toad), ¶¶ 80, 81, 83, 88, 89 (alleging failure to analyze adequately effects to "aquatic
13 ecosystems and associated species"). Plaintiffs in the fourth case, California Forestry, allege--as
14 a substantive matter--that the Forest Service placed too much emphasis upon wildlife species,
15 and--as a procedural matter--that the agency failed to analyze adequately the effects upon
16 commercial timber harvest. See California Forestry, Am. Compl. ¶¶ 22(a), 22(b), 22(c), 22(d);
17 id., ¶ 32 (alleging failure to address "substantial changes" in timber harvest levels).

18 Another common aspect to the three of the cases is the allegation in that the Forest
19 Service either failed to consider a particular alternative preferred by a plaintiff, or that the agency
20 failed to consider a reasonable range of alternatives. See Lockyer, Compl. ¶¶ 49-52; SNFPC,
21 Pls.' Am. Compl. ¶¶ 120-26; California Forestry, Am. Compl. ¶ 30. Three of the four cases also
22 include claims that cumulative effects resulting from reasonably foreseeable forest management
23 activities were not adequately considered. SNFPC v. Rey, Am. Compl. ¶¶ 116-119; Lockyer,
24 Compl. ¶ 47; Pacific Rivers, Compl. ¶¶ 93-103. In SNFPC v. Rey, the plaintiff environmental
25 groups allege that cumulative impacts of timber harvest were not adequately analyzed. SNFPC
26 v. Rey, Am. Compl. ¶¶ 116-119. In Lockyer, the California Attorney General alleges that the
27 Forest Service failed to analyze adequately the cumulative impacts of the 2004 Framework and
28 that the FSEIS does not adequately discuss mitigation of such impacts. Lockyer, Compl. ¶ 47.

1 In Pacific Rivers, the plaintiff alleges a failure to adequately analyze cumulative impacts from
2 “roads, salvage logging, fuels management, livestock grazing, mining, herbicides and
3 recreational use” on aquatic ecosystems and species. Pacific Rivers, Compl. ¶ 100. The plaintiff
4 there also alleges that mitigation of adverse effects from grazing was not adequately analyzed.
5 Id. ¶¶ 113-117.

6 In addition to claims regarding the adequacy and legitimacy of consideration of effects to
7 wildlife, all four cases also include an independent claim that the 2004 Framework violates the
8 APA by allegedly failing to provide sufficient support in the administrative record for the final
9 decision. Plaintiffs in three of the cases allege that the Forest Service has failed to justify
10 changing the direction from the prior 2001 Framework. In Lockyer, the California Attorney
11 General alleges that the Forest Service failed to provide a “reasoned analysis for its change in
12 course” when it adopted the 2004 Framework. Id., Compl. ¶¶ 34-39. In SNFPC v. Rey, the
13 environmental organizations allege that there is not any new scientific information regarding the
14 impacts to wildlife species since the adoption of the 2001 Framework that justifies the changes
15 made in the 2004 Framework. Id., Am. Compl. ¶¶ 102-106. Similarly, the plaintiff in Pacific
16 Rivers alleges that any changed circumstance or new information used to justify the 2004
17 Framework either is unsupported by evidence in the record or does not support a decision to
18 reject the 2001 Framework in favor of the 2004 Framework. Id., Compl. ¶¶ 118-123.^{3/}

19 Additionally, two of the cases allege that the 2004 Framework violates the National
20 Forest Management Act (“NFMA”), 16 U.S.C. § 1604. The environmental organizations in
21 SNFPC v. Rey allege that the Forest Service has violated NFMA by, among other things: failing
22 to maintain viability of certain wildlife species (California spotted owl, Pacific fisher, and
23 American marten), id., Am. Compl. ¶¶ 66-82; and failing to monitor and obtain inventories of
24 populations of wildlife species designated as “management indicator species.” id. ¶¶ 93-97. The
25

26 ^{3/} In the fourth case, California Forestry, the forest industry associations allege that both the
27 2004 Framework and the 2001 Framework violate the APA because the record does not contain
28 sufficient evidence that fire risk would be adequately reduced, that a high percent of the forest
should be maintained in old growth conditions, or that a diameter limit is necessary for species
viability. Id., Am. Compl. ¶¶ 36-38.

1 forestry associations in California Forestry allege that the 2004 Framework exceeds the Forest
2 Service’s authority to provide for wildlife diversity and that the agency violates NFMA and other
3 statutes^{4/} by failing to manage the national forests for the purpose of maintaining a continuous
4 supply of timber. See id., Am. Compl. ¶¶ 22(a), 22(b), 22(c), 22(d). The forestry associations
5 also challenge the legality of the very regulations under which the environmental organizations
6 in SNFPC v. Rey bring their claims. See id. ¶ 22(d) (alleging that the Framework decisions and
7 the “now-rescinded 36 C.F.R. § 219.19 (1999) also unlawfully reverse the priorities set by the
8 NFMA diversity provision”). Because the two cases contain allegations that on the one hand, the
9 2004 Framework’s consideration of wildlife is inadequate and, on the other, that it exceeds the
10 agency’s authority, consolidation is appropriate to ensure a consistent outcome.

11 In sum, the cases involve common questions of fact and law regarding analysis of
12 wildlife, as well as common issues of fact regarding the comprehensive management of national
13 forests in the Sierra Nevada. The cases therefore satisfy the criteria under Rule 42(a) and should
14 be consolidated.

15 **II. Consolidation is Appropriate Because It Would Promote Judicial Economy**

16 At present, three different groups of plaintiffs have moved to intervene in two of the four
17 cases.^{5/} These potential intervenors include: the California Ski Industry Association, the Quincy
18 Library Group, and eighteen organizations of individuals (“TuCARE, *et al.*”) who own land near
19 national forests or use the national forests for recreation, business, and their livelihood. This last
20 group includes California Forestry Association (“CFA”) and American Forest and Paper
21 Association, the plaintiffs in California Forestry. Additionally, the plaintiffs in SNFPC v. Rey
22 have recently stated that they may seek to intervene in California Forestry. See SNFPC v. Rey,
23 Pls.’ Resp. to Mots. for Intervention (Doc. No. 36) at 4 n.3 (referencing agreement with CFA that
24

25 ^{4/} The forestry associations raise additional claims under two statutes not directly involved in the
26 other cases, the Organic Administration Act of 1897 (“Organic Act”), 16 U.S.C. § 473 *et seq.*;
27 and the Multiple-Use Sustained-Yield Act of 1960 (“MUSYA”).

28 ^{5/} A fourth organization, Public Employees for Environmental Responsibility, has moved to
intervene in a third case, California Forestry.

1 it “will not oppose . . . the [Sierra Nevada Forest Protection] Campaign’s intervention in CFA’s
2 case”). Consolidation further promotes judicial economy because it could help avoid redundant
3 briefing by parties seeking to participate in several cases.

4 The usefulness of a comprehensive procedural mechanism to allow coordination of all
5 four 2004 Framework challenges is illustrated by recent responses by plaintiffs in Lockyer and
6 SNFPC v. Rey to the motions for intervention by three different groups, each of which moved to
7 intervene in both cases. The plaintiff environmental groups in SNFPC v. Rey expressed their
8 concern that their challenge to the 2004 Framework and the Basin project “is a big case,” and
9 that it estimated it would take approximately 100 pages of briefing on summary judgment.
10 SNFPC v. Rey, Pls.’ Resp. to Mots. to Intervene at 3. Those plaintiffs therefore requested that
11 the Court require the three potential intervenors to submit combined briefs or alternatively, to
12 stay cumulatively within proposed page limits. A similar request was also made by the
13 California Attorney General in responding to the same intervenors’ motions in its case. See
14 Lockyer, Pl.’s Resp. to Mots. to Intervene at 10. Federal Defendants respectfully submit that,
15 while they take no position on the propriety of imposing such limitations on the potential
16 intervenors, such questions can be more efficiently resolved at a global level if all four cases are
17 consolidated.^{6/} In sum, consolidation would promote judicial economy by providing a
18 comprehensive procedural mechanism for coordinating all four challenges to the 2004
19 Framework.

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26 ^{6/} Federal Defendant are not suggesting that the cases should be merged or that parties in
27 separate cases should have an opportunity to respond to each others’ briefs. Rather, at this time,
28 Federal Defendants move for consolidation for the purpose of better allowing the Court to
coordinate the briefing and hearing schedules among all cases.

1 CONCLUSION

2 For the foregoing reasons, Federal Defendants' motion should be granted, and the four
3 pending challenges to the 2004 Framework should be consolidated for the purposes of
4 coordination.

5 Respectfully submitted this 23rd day of May 2005.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 23, 2005, I electronically filed the foregoing Federal
3 Defendants' MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE with the Clerk of the
4 Court in *Sierra Nevada Forest Protection Campaign v. Rey*, No. CIV-S-05-0205-MCE-GGH,
5 using the CM/ECF system, which caused a copy to be served upon the following individuals:

6 J. Michael Klise, jmklise@crowell.com
7 Attorney for Plaintiffs in *Calif. Forestry Ass'n v. Bosworth*
8 Attorney for Tuolumne County Alliance for Resources & Environment, *et al.*,
9 Proposed Defendant-Intervenors in *Calif. ex rel. Lockyer v. U.S. Dep't of Agric.*,
10 and *Sierra Nevada Forest Protection Campaign v. Rey*

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I further certify that I caused a copy to be served by first class mail, postage prepaid, upon the
following individuals:

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Dated: May 23, 2005

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