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

PEOPLE OF THE STATE OF CALIFORNIA,)	
ex rel. BILL LOCKYER, ATTORNEY	)	No. CIV-S-05-0211 MCE/GGH
GENERAL,)	
Plaintiff,	)	Related Cases: CIV-S-05-0205 MCE/GGH
	)	CIV-S-05-0905 MCE/GGH
v.	)	CIV-S-05-0953 MCE/GGH
)	
UNITED STATES DEPARTMENT OF)	
AGRICULTURE; MIKE JOHANNIS, Secretary	)	MEMORANDUM OF INTERVENORS
of the Department of Agriculture; MARK REY,	)	QUINCY LIBRARY GROUP AND
Under Secretary of the Department of	)	PLUMAS COUNTY IN SUPPORT OF
Agriculture; UNITED STATES FOREST	)	DEFENDANTS' MOTION FOR
SERVICE; DALE BOSWORTH, Chief, United	)	SUMMARY JUDGMENT AND IN
States Forest Service; and	)	OPPOSITION TO BILL LOCKYER'S
BERNARD WEINGARDT, Regional Forester,	)	MOTION FOR SUMMARY JUDGMENT
Pacific Southwest Region, United States Forest)	
Service,)	
)	
Defendants,	)	Date: March 20, 2006
	)	Time: 9:00 a.m.
and)	Courtroom: 3, 15 th Floor
)	Hon. Morrison C. England, Jr.
QUINCY LIBRARY GROUP, <i>et al.</i> ,)	
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Defendant-Intervenors)	
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City of Sausalito v. O’Neill, 386 F.3d 1186 (9th Cir. 2004).....10

Fund for Animals v. Lujan, 962 F.2d 1391 (9th Cir. 1992).....20

Gorbach v. Reno, 179 F.3d 1111 (9th Cir. 1999).....11

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Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170 (9th Cir. 2000).....19

Kleppe v. Sierra Club, 427 U.S. 390 (1976).....15

Laguna Greenbelt, Inc. v. DOT, 42 F.3d 517 (9th Cir. 1994).....10

Los Angeles v. Shalala, 192 F.3d 1005 (D.C. Cir. 1999).....20

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Personal Watercraft Ass’n v. Department of Commerce, 48 F.3d 540 (D.C. Cir. 1995).....12

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ACRONYMS AND ABBREVIATIONS

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

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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.
5. Citations to planning documents related to the 2001 Framework that are found on CD#17 are referenced by Document ID numbers found at the end of file names.

I. INTRODUCTION

Intervenor PLUMAS COUNTY is a political sub-division of California and is the governing board of the local public agency that has the principal responsibility under California law for preserving and promoting the general health, safety, and welfare of the citizens of Plumas County. Since Plumas County is 74% owned by the federal government, and the management of government land has a substantial effect on the economy and the environment of Plumas County, the County Board of Supervisors has long been engaged in federal processes, including the 2001 and 2004 Sierra Nevada Forest Plan Amendment (SNFPA) processes.

Intervenor QUINCY LIBRARY GROUP (QLG) has been attempting to resolve the question of appropriate federal forest management by working for what NEPA, 42 U.S.C. § 4331, calls “productive harmony” in the face of contentious debate about the appropriate spotted owl/fire/logging balance in the Sierra Nevada mountain range. QLG proposed a program of land management to the executive and legislative branches of government that resulted in the Herger-Feinstein Quincy Library Group Forest Recovery Act of 1998 (hereinafter HFQLG Act). SNFPA 986, FEIS CD#16, file “QLGlaw.pdf.” QLG members took part in the 1999 EIS process for the HFQLG Pilot Project directed by the HFQLG Act, and administratively appealed a decision made in the HFQLG Record of Decision (ROD) to defer the implementation of the Act pending completion of the 2001 SNFPA. QLG members took part in the environmental impact statement (EIS) process for the 2001 SNFPA and administratively appealed the decision in that ROD. SNFPA 937.

As discussed below, the introduction of the 2004 Framework as a replacement for the faulty 2001 Framework is in accordance with NEPA and NFMA and allows and authorized the HFQLG Pilot Program.

II. FACTUAL BACKGROUND

How the Owl Became King: The Reasoning Behind A Single Use Forest.

To understand how the Forest Service adopted the flawed 2001 Framework, one has to

1 understand the flawed data behind it. In 1992, the Forest Service issued *The California Spotted*
2 *Owl: A Technical Assessment of Its Current Status*, PSW-GTR-133 (the “CASPO Report”),
3 Verner et al, 1992. SNFPA 1010 *et seq.* The CASPO Report reviewed the spotted owl
4 literature and science, and found the northern spotted owl management prescriptions (large block
5 reserves excluding active management) were likely to fail in the Sierra Nevada because of the
6 higher likelihood of catastrophic wildfire due to fire-adapted ecosystems. SNFPA 1035.
7 Consequently, the Technical Report recommended an active management prescription that
8 became known as the “CASPO prescription,” to protect owl habitat from inappropriate old-
9 growth logging while requiring active vegetation management (logging and biomass removal)
10 to remove the threat to owls and humans from catastrophic fire. SNFPA 1036-1040.

11 Despite detailed data collection and analysis, no cause-and-effect relationship could be
12 (or has yet been) established between forest management practices and spotted owl population
13 viability. The CASPO report explained, stating:

14 At the landscape scale, we see little in the overall distribution pattern of
15 California spotted owls to suggest how we might distinguish between suitable
16 and unsuitable habitat. We have learned much about particular stand
17 attributes that are used selectively by California spotted owls, but we have
18 been unable to connect them with studies of the owl’s reproductive success
19 — or failure. We are still uncertain about what levels of canopy cover, tree
20 densities and sizes, quantities and sizes of downed woody debris, and so on,
are found where owls reproduce consistently and well. Only by linking
demographic rates with habitat attributes can we eventually distinguish
among superior, suitable, marginal, and unsuitable habitat.”

21 SNFPA 1045.

22 The 1992 CASPO Report team concluded that it could not be certain that the Sierran
23 population of spotted owls was declining, but noted that the owls’ “...current distribution and
24 abundance, however, do not suggest that they have declined either in their overall distribution
25 in the Sierra Nevada or that they have declined markedly in abundance within any forest type.”
26 SNFPA 1028. In the same set of conclusions, the CASPO scientists said:

27 Are key habitat elements declining in the Sierra Nevada? Yes. Of greatest
28 concern to us at this time is the rapid disappearance of the large, old, and
generally decadent trees that are the focus of nesting by spotted owls. Given

1 projections from approved and draft [land management plans, aka forest plans]
2 for [national forests] in the western Sierra Nevada, where the vast majority of
3 Sierran owls occur, these important stand components will disappear at a rapid
4 rate over the next few decades. They cannot be replaced quickly.
5 SNFPA 1028.¹

6 Instead of the clearcutting programs of the Sierran forest plans, the CASPO Report scientists
7 recommended instituting “interim guidelines” that would retain forest structures important to
8 California spotted owls, while aggressively reducing forest fuels to protect the existing old
9 growth and owl habitat from loss to severe wildfire. The California Spotted Owl Sierran
10 Province Interim Guidelines (the CASPO guidelines) were promulgated in 1993, and remained
11 the legally binding management direction for these national forests until the signing of the 2001
12 SNFPA ROD.

13
14 **The Single Management Alternative for the Sierran Forests: How the Flawed 2001
15 Framework and ROD Disregarded Beneficial Multiple-Use.**

16 In November 1997 the Chief of the Forest Service directed the Pacific Southwest Region
17 Five to “develop a strategy to ensure ecological sustainability” for the Sierra Nevada forests.
18 SNFPA 229. The original 2001 Framework pioneered a planning concept called “ecological
19 sustainability.” SNFPA 230. This concept is not specifically identified in any of the statutes
20 governing Forest Service management, but was a concept contained in a set of Clinton
21 administration proposed planning regulations that were later withdrawn by the Bush
22 administration. In accordance with NEPA requirements for the SNFPA, the QLG requested that
23 the Forest Service use the authorized planning regulations (then 36 CFR 219 *et. seq.*) for the
24 forest plan amendments. Despite this request, the SNFPA planning process discarded the
25 official regulations and operated as though the Clinton administration’s proposed regulations
26 had already been made law.

27 On August 11, 2000, QLG filed extensive comments on the draft EIS, pointing out many

28 ¹ Seventy-two percent of the timber volume projected in the original (1980s) set of forest plans
for Sierran forest was to be harvested as clearcuts. SNFPA 1027.

1 substantive and procedural flaws. Meanwhile, the Forest Service prepared its first Biological
2 Assessment (BA) for the DEIS and submitted it to the US Fish and Wildlife Service (FWS) in
3 August of 2000 for formal consultation pursuant to the Endangered Species Act (ESA). The
4 FWS rejected the BA, however, stating that “. . . through my staff’s involvement with the
5 project . . . we are aware that since the publication of the DEIS many changes to the project
6 description have been or are in the process of being made. These changes render obsolete the
7 analyses in the BA submitted to us for consultation.” SNFPA 00988, FEIS CD #17, Doc. ID
8 1357, p.1.² The Framework’s planning records show that from September 2000 until the
9 approval of the 2001 ROD in January, the Forest Service and other federal and state agencies
10 negotiated internally about fashioning another Framework alternative with even more stringent
11 owl conservation and adaptive management strategies, less “flexibility” and thus less discretion
12 in logging prescriptions, new viability determinations for spotted owls, goshawks, and
13 furbearers (fisher and marten), and a total elimination of timber production as an authorized use
14 of the forests in the Sierra Nevada.

15 The planning records also show that the Forest Service’s Washington Office staff took
16 over the development of the new alternative from the Framework interdisciplinary team. On
17 October 27, 2000, Chris Iverson of the Forest Service’s Washington Office produced a 3-page
18 paper titled “Draft California Spotted Owl Conservation Strategy, Sierra Nevada FEIS.”
19 SNFPA 00988, FEIS CD #17, Doc. ID 1669. The paper stated that “the management priority”
20 in General Forest as well as Old Forest Emphasis Areas should be “the protection and
21 maintenance of spotted owl habitat.” *Id.* at 3. An accompanying summary table prepared later
22 in the process by Mr. Iverson shows that the General Forest and Old Forest Emphasis Area land
23 allocations amounted to 9,890,000 of the Sierra Nevada’s 11,500,000 acres of national forests.
24 SNFPA 00988, FEIS CD #17, Doc. ID 1670. Thus the new, and ultimately selected
25 Framework alternative devoted 86% of the lands of the Sierra Nevada’s national forests to

26
27 ²Document ID 1357 can be found in the CD directory at the following location:
28 Interdisciplinary>FEIS>BA_ltr_Connaughton_id1357.pdf. Document ID numbers at the ends
of filenames uniquely identify all records on FEIS CD#17.

1 growing California spotted owl habitat. The new owl strategy declared, “Mechanical fuels
2 treatments are limited to removal of surface and ladder fuels necessary to reduce average flame
3 lengths and overstory mortality to specified levels in the event of a wildfire.” SNFPA 00988,
4 FEIS CD #17, Doc. ID 1669, p.1.

5 The new alternative became a management strategy of single-purpose forest
6 management, and that single-purpose was the owl. SNFPA 00988, FEIS CD #17, Doc. ID
7 1401 (duplicated as Doc. ID 1673 also). In an inter-agency meeting discussing owl
8 conservation on November 2, 2000, the discussion included the fact that, under the new
9 alternative, concerns for owl habitat would eliminate the timber harvest programs from Sierran
10 national forests. As the Interdisciplinary Team leader said in reference to timber harvest
11 programs, “[we] used to have a timber program... [t]his is different. You can’t design a plan for
12 dinosaurs, need plan for the future.” SNFPA 00988, FEIS CD #17, Doc. ID 1401, p. 5.

13 Dissenting opinions and adverse “unintended consequences” of the new alternative were raised
14 in this meeting, regarding effectiveness,³ financial feasibility,⁴ the lack of a reforestation
15 strategy, and concerns about silvicultural principles and forest composition.⁵ These concerns
16 were revived again and again in later years, but were only finally addressed in the 2004
17 Framework SEIS and ROD.

18 In 2000, the Forest Service elected to ignore the new alternative’s infeasibility of
19 implementation, high costs, and long-term forest composition problems. A second draft dated
20 11/15/2000, and a later final draft of the then named “DRAFT California Spotted Owl

21
22 ³ Framework Fire and Fuels specialist Bernie Bahro pointed out that they couldn’t achieve fuels
23 objectives with a 12” diameter limit on cutting of trees. SNFPA 00987, FEIS CD #17, DOC ID
1673, p. 6.

24 ⁴ The cost limitations were pointed out by Framework biologist Dawn Lipton, regional
25 silviculturist Mike Landram, and by Framework Science Team leader Peter Stine, who
26 indicated that the “[d]ifference between 12-20” trees at forest supervisor’s meeting was
27 multibillion dollar treatment. Good reason why fire treatment programs have not been done.”
28 *Id.* at 5.

⁵ Regional silviculturist Mike Landram, and PSW scientists Danny Lee and Bill Laudenslayer
faulted the new alternative’s prescriptions as “preferentially selecting species to detriment of
ponderosa pine, sugar pine, and black oak” and for lack of regard for growing replacements for
today’s big trees. *Id.*

1 Conservation Strategy” was completed on December 9, 2000. SNFPA 988, FEIS CD #17,
2 Doc. ID 1404. The new alternative became Alternative Modified 8: the 2001 Framework’s
3 adopted alternative. This strategy, which eliminated much of the activity prescribed in the
4 HFQLG Act, contained new standards and guidelines that were substantially different than
5 those contained in any of the alternatives considered in the earlier public NEPA process. On
6 January 12, 2001, the FEIS was certified and the ROD was signed by the Regional Forester
7 without either the new owl strategy or the new alternative being circulated to the public for
8 comment or review.

9 On April 17, 2001, the QLG and Plumas County filed their administrative appeal. In
10 December of 2001 that appeal was denied, but because the Regional Forester was ordered by
11 the Chief of the Forest Service to review some of the appeal issues, the Regional Forester
12 convened a review team, which produced a Management Review and Recommendations
13 Report in March 2003. SNFPA 1913-2081. This report assembled the new information that
14 made it necessary to do a supplemental EIS. Key findings of the review team included a
15 conclusion that “[a]ssumptions about the viability of the California spotted owl weighed
16 heavily in the management direction set forth in the SNFPA. New information . . . changes
17 some of these [previous] assumptions.” SNFPA 1923. Primary sources for this new information
18 included a publication by Lee and Irwin, as well as the Meta-Analysis requested by the SNFPA
19 team. SNFPA 2638-2657; SNFPA 4346, SEIS_05_003745. The team also found that “[n]ew
20 analysis of existing owl demographic data suggested that owl populations might not be
21 declining as dramatically as assumed in the [2001] Final Environmental Impact Statement.” *Id.*
22 The team also concluded that “[a]lternative analytical techniques for assessing California
23 spotted owl habitat at the landscape scale suggest that the current habitat status across the
24 Sierras is better than reported in the [2001] FEIS.” SNFPA 1924.

25 In response to these findings, the Regional Forester convened his owl experts three times
26 over the course of fourteen months, in June 2002, February 2003, and August 2003. SNFPA
27 2431-2447; 4337; SEIS_01_000268. These experts denied scientific support for important parts
28 of the 2001 SNFPA owl conservation strategy, including standards and guidelines necessary for

1 vegetation management under the 2001 Framework ROD decision. The Regional Forester
2 concluded that “[t]he opportunity exists to improve the effectiveness of fuels treatments *while*
3 limiting effects to habitat at the landscape scale in the short-run and developing and
4 maintaining owl-nesting habitat in the long run.” SNFPA 1923 (emphasis added). The FSEIS
5 and ROD were issued in January 2004, containing both the responses to public comments and
6 other elements required by NEPA, as well as the scientific data in support for the change in
7 policy. Numerous parties, including QLG, filed appeals of the ROD and FSEIS and all appeals
8 were denied. The 2001 Framework was adopted and, despite the flaws and public criticism, the
9 Forest Service made a reasonable attempt to implement it. That attempt failed.

10 **Application of the 2001 Framework**

11 When the spotted owl experts examined the status of California spotted owls for the
12 CASPO report in 1992, they found that “In spite of the fact that logging has occurred over
13 nearly all of the conifer forests of the Sierra Nevada in the past 100 years, and especially in the
14 past 50 years, spotted owls continue to be widely distributed throughout most of the conifer
15 zone. Indeed, spotted owls may be more abundant in some areas of the Sierra Nevada today
16 than they were 100 years ago.” SNFPA 1035. However, despite the evidence of widespread
17 owl viability, the fear of widespread owl decline has led to a marked decline of vegetation
18 management necessary for forest health:

19 The mixed-conifer zone of the Sierra Nevada, therefore, has few or no stands
20 remaining that can be described as natural or pristine. To various degrees, the
21 forest system has been changed from one dominated by dense, fairly even-aged
22 stands in which most of the larger trees are 80-100 years old. This forest appears
23 to be unstable. It is highly susceptible to drought-induced mortality, as
24 competition for water weakens trees on drier sites. It is impacted by massive
25 bark beetle infestations, *and it is very flammable.*

26 [SNFPA 01250] (emphasis added).

27 Fire has been an integral component of Sierra Nevada coniferous forests for millennia.
28 Prior to Euro-American settlement, frequent fires played a significant role by reducing
accumulated surface fuels and maintaining open under-stories relatively free of fuel ladders,
which carry fire into the forest canopy. Fire was also a major factor in maintaining the

1 ecological balance of tree species in these forests, reducing the density of shade-tolerant species
2 such as white fir and incense cedar and favored the more fire-resistant pines. Exclusion of these
3 widespread, low severity natural fires during the past one hundred years, combined with
4 logging of large fire-resistant old growth trees, has resulted in forests with dense under-stories
5 and fire ladders of shade-tolerant, fire-prone conifers (such as white fir) and fewer pines.
6 Under these conditions, fires tend to be larger, more severe, and increasingly difficult and
7 dangerous to control. Sierra Nevada Ecosystem Project scientists inform us that, “High
8 severity wildfires are considered by many to be the single greatest threat to the integrity and
9 sustainability of Sierra Nevada forests.” SNEP Vol. II, Ch. 56 at 1471.

10 The Sierra Nevada mountain range and the HFQLG area include three major vegetation
11 types where these unnatural conditions are prevalent. The west side ponderosa pine forest and
12 the mid-elevation mixed conifer forests have lost much of their original dominance by
13 ponderosa pine, and under-stories are now composed largely of white fir, incense cedar, and
14 Douglas fir. The east-side ponderosa and Jeffrey pine forests show significant encroachment
15 by white fir, which is not well adapted to the drier conditions there. Stands once dominated by
16 relatively few fire resistant trees have been logged of their large trees and have grown thick
17 with middle-size and very small trees per acre.

18 The proliferation and encroachment of white fir degrades forest health and contributes to
19 an extreme fire hazard. The two main reasons are: (1) The hundreds (sometimes thousands) of
20 small trees per acre make a highly combustible fuel bed and form a fire ladder to carry ground
21 fire into the crowns of the larger trees, and (2) where white fir is overcrowded or has invaded
22 the drier pine stands, it creates a moisture stress for all the trees, and entire stands become
23 overly susceptible to forest insects (primarily bark beetles), diseases and drought, spreading
24 infection and infestation. The dead trees then exacerbate the fire hazard. SNEP Vol. II, Ch. 15
25 at 443.

26 **A Call for Change: The HFQLG Pilot Project**

27 The HFQLG Act attempts to address the “unproductive disharmony” between people and
28 their forests that has resulted from deteriorating conditions in the Sierra Nevada Forests. The

1 Act directs the Secretary of Agriculture to implement a Pilot Project on the Plumas, Lassen,
2 and Tahoe National Forests. It specifies three management activities to provide for: (1) the
3 construction of between 40,000 and 60,000 acres per year of Defensible Fuel Profile Zones
4 (shaded fuelbreaks); (2) group selection harvest of on 8,700 acres per year (individual tree
5 selection is also permitted); and (3) to provide riparian protection and watershed restoration to
6 the environment. The Act requires that implementation shall be cost-effective, and in
7 accordance with the CASPO guidelines for management of spotted owl habitat. The Act also
8 designated “off-base” areas (about 320,000 acres) that exclude the management activities from
9 road-less areas and other sensitive lands, and “deferred” areas (about 147,000 acres) where the
10 specified management will not take place during the term of the Pilot project. In addition, all
11 spotted owl protected activity centers (PACs) and certain other non-forested lands are
12 excluded, leaving about 1.5 million acres of “on-base” area available for Pilot Project
13 implementation.

14 In August of 1999 the Forest Service completed the HFQLG Pilot Project Final EIS
15 [FEIS] and Record of Decision [ROD] adopting Alternative 2, a faithful implementation of the
16 HFQLG Act. The FEIS and Record of Decision found that the HFQLG pilot program was
17 environmentally beneficial except for a “potential” to perhaps cause a trend toward listing for
18 the California spotted owl. Cite. QLG unsuccessfully appealed the decision on the Pilot Project
19 and meaningful work in the forest was delayed. The HFQLG ROD ordered that
20 reconsideration of all spotted owl issues would be handled in the 2001 Sierra Nevada
21 Conservation Framework (SNFPA). Increasingly desperate workers, contractors, mills, and the
22 forest-dependent local economies had to wait for that process to grind out a solution. For the
23 QLG, the 2004 Framework ROD is such a temporary solution.

24 **III. ARGUMENT**

25 26 **1. The Forest Service’s Rejection Of The 2001 Framework Is In Accordance With The Federal Administrative Procedure Act.**

27 28 **A. The Standards of Judicial Review Are Deferential To The Agency**

1 Plaintiff argues that the 2004 SEIS on the Framework does not comply with NEPA and that
2 the Framework itself is an arbitrary action under the Administrative Procedure Act (“APA”).
3 Both sets of claims are reviewed under the APA, 5 U.S.C. 706. A federal agency is presumed
4 to be acting lawfully and, on issues of contested fact, the agency’s view cannot be overturned
5 unless it is “arbitrary” and is a “clear error of judgment.” *Citizens to Preserve Overton Park v.*
6 *Volpe*, 401 U.S. 402, 415-16 (1971). When the factual issue concerns an opinion or judgment
7 on some environmental or silvicultural matter, on such a “scientific determination...a reviewing
8 court must generally be at its most deferential.” *Baltimore Gas & Electric Co. v. Natural*
9 *Resources Defense Council*, 462 U.S. 87, 103 (1983). An “agency must have discretion to rely
10 on the reasonable opinions of its own qualified experts even if, as an original matter, a court
11 might find contrary views more persuasive.” *Marsh v. Oregon Natural Resources Council*, 490
12 U.S. 360, 377-78 (1989).

13 Review of environmental impact statements (EIS) is strictly “limited and decidedly
14 deferential.” *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir.
15 1994). An EIS is adequate under a NEPA “rule of reason” analysis if it contains “a reasonably
16 thorough discussion of the significant aspects of the probable environmental consequences.”
17 *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1206-07 (9th Cir. 2004); *Churchill County v.*
18 *Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001) *Laguna Greenbelt, Inc. v. DOT*, 42 F.3d 517, 523
19 (9th Cir. 1994). A reviewing court then makes a “pragmatic judgment” on whether the EIS has
20 reasonably fostered “informed decision-making and informed public participation.” *Id.* The
21 law cautions that such review should not “fly speck” the SEIS and find it “insufficient on the
22 basis of inconsequential, technical deficiencies.” *Swanson v. U.S. Forest Serv.*, 87 F.3d 339,
23 343 (9th Cir. 1996). “If the agency discusses the main environmental effects reasonably
24 thoroughly, that’s enough.” *City of Los Angeles v. FAA*, 138 F.3d 806, 807 (9th Cir. 1998).

25 **B. A Federal Agency Has Inherent Authority To Reconsider Its Decisions And To**
26 **Alter Its Policies. The 2004 Framework Should Receive The Same Judicial**
27 **Deference As The 2001 Framework.**

27 Federal agencies have “inherent authority to reconsider their own decisions,” as the power
28 to decide includes the power to reach a different conclusion. *Gorbach v. Reno*, 179 F.3d 1111,

1 1123-24 & n. 16 (9th Cir. 1999). Different Administrations may lawfully choose to advance
2 different policies:

3 [I]f the agency adequately explains the reasons for reversal of a policy, “change is not
4 invalidating, since the whole point of *Chevron* is to leave the discretion provided by the
5 ambiguities of a statute with the implementing agency.” *Smiley v. Citibank (South
6 Dakota), N.A.*, 517 U.S. 735, 742...(1996)..... “An initial agency interpretation is not
7 instantly carved in stone. On the contrary, the agency...must consider varying
8 interpretations and the wisdom of its policy on a continuing basis,” *Chevron [U.S.A.
9 Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)], at 863-64..., for
10 example, in response to changed factual circumstances or a change in administrations,
11 see [*Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Life Ins. Co.*, 463 U.S. 29 (1983)]
12 at 59... (Rehnquist, J. concurring in part and dissenting in part).⁶ That is no doubt why
13 in *Chevron* itself, this Court deferred to an agency interpretation that was a recent
14 reversal of agency policy. See 467 U.S., at 857-58.

15 *National Cable & Tel. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005).

16 The Forest Service had inherent authority to reconsider the 2001 Framework and to adopt the
17 2004 Framework. As long as the agency provides a procedural explanation for the change in
18 course, the APA is satisfied. *Id.*; *Springfield, Inc. v. Buckles*, 292 F.3d 813, 819 (D.C. Cir.

19 2002). Similarly, since NEPA only requires a procedural disclosure of environmental impact
20 information and of the agency’s objectives, courts cannot review the substance of those
21 objectives. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-53 (1989).

22 Judicial review cannot extend to the substantive need for, or desirability of, a particular policy
23 (e.g., increased protection from wildfires). *Mobil Oil Expl. & Prod. Southeast, Inc. v. United
24 Dist. Cos.*, 498 U.S. 211, 230-31 (1991); *Vt. Yankee Nucl. Power Corp. v. Natural Res. Def.*

25 *Council*, 435 U.S. 519, 541-48 (1978); *Personal Watercraft Ass’n v. Department of Commerce*,
26 48 F.3d 540, 544-45 (D.C. Cir. 1995). The Constitution vests such policy decisions in the
27 Executive and Legislative Branches.

28 The National Forest Management Act (“NFMA”) allows the Forest Service to adopt an
amendment to a forest plan at any time. 16 U.S.C. 1604(f)(4). The Forest Service explained
the policy changes in the 2004 Framework in a procedurally-adequate manner that satisfies the

⁶ As Justice Rehnquist stated there: “A change in administrations brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.” *State Farm*, 463 U.S. at 59.

1 APA and NEPA. Plaintiff could challenge the *substance* of the 2004 Framework had it had
2 brought claims of substantive violations of the NFMA or some other statute, *but they did not do*
3 *so*. Their motion should consequently be dismissed.

4 **2. The 2004 Framework Complies with NEPA**

5 **A. The Forest Service Has Provided Procedurally-Adequate Explanations For The** 6 **Changes In Policy In The 2004 Framework That Satisfy The APA And NEPA.**

7 NEPA remains “our basic national charter for protection of the environment.” 40 CFR §
8 1500.1. There are two express objectives underlying the statute: “(1) to ensure that the agency
9 will have detailed information on significant environmental impacts when it makes decisions;
10 (2) to guarantee that this information will be available to a larger audience.” *Neighbors of*
11 *Cuddy Mt. v. Alexander*, 303 F.3d 1059, 1063 (9th Cir. 2002). In accordance with those
12 objectives, once an EIS has been completed, a court’s review of the EIS under NEPA is
13 “extremely limited.” *National Parks & Conservation Ass’n v. United States Dept. of Transp.*,
14 222 F.3d 677, 680 (9th Cir. 2000). Because it does not “contain substantive environmental
15 standards and guidelines,” the Act does not mandate “that agencies achieve particular
16 substantive environmental results.” *Center for Biological Diversity v. U.S. Forest Service*, 349
17 F.3d 1157, 1166 (9th Cir. 2003). The decisions of the Forest Service are neither arbitrary or
18 capricious. Looking to the “purpose and need” section of the SEIS for justification, the Lockyer
19 Br. (at 23-35) asserts that the Forest Service lacked a reasoned analysis for their adoption of the
20 2004 Framework. What the authors of the brief forget is that the SEIS is only an environmental
21 impact *disclosure* document, not the decision-making document. A *supplemental* EIS, by its
22 nature, focuses on new environmental information relevant to describing the environmental
23 impacts of alternatives. Under 40 C.F.R. 1505.2, the record of decision is the document
24 describing why a particular alternative was selected as the agency action. Thus, the 2004 ROD
25 is the more relevant document to serve as a source of a reasoned analysis for adoption of the
26 2004 Framework, something both the 2004 ROD (at SNFPA 2993-3002) and the SEIS
27 adequately accomplish.
28

1 **1. Practical And Scientific Data Collected After The Application Of**
2 **The 2001 Framework Exposed Serious Flaws Which Justified The**
3 **Eventual Adoption Of The 2004 Framework.**

4 “Deference to an agency's technical expertise and experience is particularly warranted
5 with respect to questions involving ... scientific matter.” *United States v. Alpine Land and*
6 *Reservoir Co.*, 887 F.2d 207, 213 (9th Cir.1989), *cert. denied*, 498 U.S. 817 (1990). Once the
7 2001 Framework was taken off the paper and applied to the ground, the Forest Service found
8 the plan overly-constrained. One shortcoming was that the Forest Service often had to “drop[]
9 the proposed thinning activity” due to “current standards” because “the 2001 Plan prescribed
10 technical solution [did] not produce needed results.” SNFPA 2995 (2004 ROD at 5); *see id.* at
11 2998; *also see* SNFPA 1927-1932. The Lockyer Br. (at 33-34) argues there “is no evidence
12 that the 2001 Framework prevents effective fuels treatment.” This is invalidated by a survey of
13 district rangers, where more “than 80 percent of the ranges reported that the current standards
14 and guidelines prevent effective treatments” (SNFPA 1928), and other evidence contained in
15 the SNFPA Management Review Report (SNFPA 1923-48).⁷ This evidence is summarized in
16 the ROD at SNFPA 2995.

17 This Administration also felt less comfortable with the 2001 Framework’s approach of
18 fighting fire with fire – of relying more heavily on prescribed burning to reduce overly-dense
19 forests and hoping those fires do not get out of control. This provides a rational basis for
20 moving to greater allowance of mechanical methods to thin overly-dense forests. *See* SNFPA
21 1958 and 1962. The review team also found that initial landscape-level analysis indicated the
22 current direction would not reduce the number of high-severity acres burned over time, and that
23 the standards and guidelines in the 2001 ROD would not restore historic fire regimes across the
24 landscape. SNFPA 1958. These findings provided the Administration additional reasons to
25 change the 2001 Framework ROD.

26 _____
27 ⁷ An April 2001 report of the National Ass’n of Forest Service Retirees also criticized the
28 impracticality of implementing the 2001 Framework’s layers of prescriptive standards. CFA
360-401

1 By allowing a few more trees of economic value to be cut, the Forest Service found it
2 could treat a larger number of acres for the same budget. The Regional Forester's review team
3 determined that the standards and guidelines of the 2001 ROD limited the potential for
4 communities to seek economic opportunities resulting from fuels treatment by-products.
5 SNFPA 1958. Keeping some flow of timber also retains the timber industry infrastructure
6 needed to assist on forest health treatments, and continues to provide employment and a tax
7 base in many communities. SNFPA 2994, 2998, 3007 (2004 ROD at 4, 9, 17). California
8 currently imports approximately 76% of the 8 billion board feet of softwood lumber consumed
9 annually by its residents. Importing this volume of lumber instead of properly managing and
10 harvesting readily available timber and biomass resources within California national forests has
11 led to the loss of jobs, local economic opportunities and tax revenue, has accounted for a steep
12 decline in the economic viability of rural, timber dependent communities, has reduced electric
13 generating capacity during the worst electricity crisis in State history, and has increased Federal
14 costs for fuel reduction, roads and school payments that could otherwise be handled out of
15 Forest Service revenues from timber receipts. The SEIS (at 28-29, SNFPA 3100-01)
16 summarizes these reasons in a manner that satisfy both the APA and NEPA.

17 **2. The Forest Service Adequately Evaluated the Impacts of the Full**
18 **Implementation of the Congressionally Authorized QLG Pilot**
19 **Project.**

20 NEPA requires disclosure of all foreseeable direct and indirect impacts. 40 C.F.R. §
21 1502.16. The Lockyer Br. (at 46-47) asserts the "SEIS failed to analyze the impacts of fully
22 implementing the Quincy Pilot Project." The record does not support this assertion. The Forest
23 Service adequately described its policy reasons for wanting to fully implement this Pilot
24 Project. *See* SNFPA 3001-02 (ROD at 11-12), 3101 (SEIS at 29), 3121, 3131-34, 3166-78,
25 3264-3392. The Forest Service had two main goals: (1) to obtain information on the effects of
26 small-area group harvesting of trees on species and fire frequencies to provide superior data on
27 adaptive management than was available under the 2001 Framework; *Id.*; *see* SNFPA 3139-43,
28 and (2) to provide American forest products for American consumers, as well as to continue
viable timber employment and needed tax base to affected communities. *See* SNFPA 3001-02

1 (ROD at 11-12), 3101 (SEIS at 29). This policy choice is reasonable, not arbitrary, as timber
2 production is a legitimate objective in national forest management. 16 U.S.C. § 1600 *et seq.*
3 Further, Sen. Feinstein (D. Cal.) and Rep. Herger (R. Cal.) sponsored enactment of the HFQLG
4 Forest Recovery Act, 112 Stat. 2681-305 (1998), and it includes the QLG Pilot Project. Thus,
5 the Lockyer argument that the Pilot Project is clearly contrary to the interests of California
6 citizens rings hollow. More pertinent in a court of law, it certainly is not arbitrary for the
7 Executive Branch to attempt to fully implement an Act of Congress.

8 As the authors of the Lockyer brief should know, while the SEIS discusses the general
9 impacts of the QLG Pilot Project, the site-specific impacts are being addressed in NEPA
10 documents on the site-specific projects that implement the Pilot Project. *E.g.* BASIN 3657-
11 3749. To find the Pilot Project-wide discussion of impacts inadequate without considering the
12 site-specific NEPA documents is premature. Latter NEPA documentation is being ignored in
13 the Lockyer Br., even for the Basin Project, to preserve their argument before this court. The
14 Lockyer Br. (at 46) complains that the QLG Pilot Project analysis is “scatter[ed]...throughout
15 the FSEIS,” instead of being written in a stand-alone EIS as was done on the QLG Pilot Project
16 in 1999. Yet, the decision to analyze the QLG Pilot Project and other portions of the 2004
17 Framework in a single EIS, or the decision *not* to do so “is properly left to the informed
18 discretion of the responsible federal agencies.” *Kleppe v. Sierra Club*, 427 U.S. 390, 412
19 (1976). This approach complies with the strong trend towards a cumulative, holistic NEPA
20 analysis in Ninth Circuit case law. The brief also contends that, while the SEIS “discloses
21 [many] facts” on the impacts of fully implementing the QLG Pilot Project, the agency has
22 “completely failed to analyze their significance” in terms of the risks to the “viability of the
23 California spotted owl” described in the 1999 EIS. Again, the SEIS *does* address the new
24 scientific data available on the spotted owl. The 1999 view that the CASPO interim guidelines
25 were not adequate was made in “light of recent demographic studies showing declining spotted
26 owl populations.” BASIN 1324. However, by 2004, more recent science asserts that owls are
27 “within the 95% confidence limits of a stable population.” SNFPA 3340 (SEIS at 270). New
28 data has led the FWS to conclude there is sufficient suitable habitat (“4,628,100 acres”) for

1 viable populations of spotted owls to persist in the future, thus eliminating the need for listing
2 under the Endangered Species Act (“ESA”). 68 Fed. Reg. 7580, 7586, 7601, 7607 (Feb. 14,
3 2003). This credible new data eliminates the need for the full set of habitat constraints thought
4 necessary in the 1999 EIS.⁸ Hence, the changes made by the 2004 Framework cannot be
5 characterized as being either arbitrary or unsupported by record evidence.

6 **3. Opposing Viewpoints And Comments Were Disclosed.**

7 Plaintiff argues (at 38-41) the Forest Service failed to disclose opposing viewpoints and
8 to respond to substantive comments. This is untrue. Volume 2 of the SEIS provided 137 pages
9 of responses to distinct comments and disclosed additional viewpoints by including copies of
10 the major comments from State and other public entities. SNFPA 3564-3933. Volume 2
11 reprints the comments filed by the California Attorney General (SNFPA 3756-83), California
12 Dept. of Resources (3798-3828), EPA (3907-14), and FWS (3921-30). Those comments are
13 part of the SEIS and are provided in an organized fashion (Nevada governmental comments,
14 then California governmental comments, then federal agency comments). Nearly 400 pages of
15 comments and responses in a NEPA document clearly satisfies NEPA’s rule of reason.

16
17 ⁸ See 68 Fed. Reg. at 7584-90, 7595-601. For example, owls “use a broader range of
18 habitat types than the northern spotted owl.” *Id.* at 7585. While spotted owls preferentially
19 select “[l]ate successional forests” for nesting, “[f]oraging habitat” includes “stands of trees of
20 30 cm (12 in) in diameter or greater, with canopy coverage of 40 percent or greater.” *Id.* at
21 7586, 7589.

22 In light of the owl-related changes in the 2004 Framework and other factors, FWS has
23 decided to take an in-depth look (through a status review) before deciding whether the
24 California spotted owl warrants ESA listing under the current regulatory protections. 70 Fed.
25 Reg. 35607 (June 21, 2005). FWS has not yet provided its expert view.

26 Our 90-day finding considers whether the petitioners have stated a reasonable case that
27 listing may be warranted. Thus, our finding expresses no view as to the ultimate issue
28 of whether the species should be listed. We [will] reach a conclusion on that issue only
after a thorough review of the taxon’s status.... After publication of our 12-month
finding, the Forest Service issued a revised SNFPA (USFS 2004a) that allows for full
implementation of the HFQLG Pilot Project, and for more flexibility in locating and
implementing effective fire-fuels treatments than did the 2001 SNFPA (USFS 2001).
We have not yet completed a detailed analysis of how these differences will affect the
California spotted owl.

70 Fed. Reg. 35608, 35611; *see id.* at 35610 (continuing to state that “[f]oraging habitat is
generally described as stands of trees of 30 cm (12 in) in diameter or greater, with canopy cover
of 40 percent or greater,” which is maintained in owl areas under the 2004 Framework).

1 The SEIS disclosed the differing viewpoints on the habitat risks to some wildlife from more
2 active forest management. Volume 1 of the SEIS has a section on uncertainties in science and
3 on the risk trade-offs. SNFPA 3109-14. The SEIS (at 271-76, 280) discloses the increased
4 short-term risk to spotted owls from greater habitat manipulation from the 2004 Framework
5 and full implementation of the QLG Pilot Project. SNFPA 3341-46, 3350. The SEIS (at 215-
6 22, 276-80) also: (1) discusses the advantages of the 2004 Framework in likely reducing the
7 acreage burned by wildfires, thereby providing equal or greater habitat (e.g., more large trees)
8 for owls at the landscape scale over time, while also supplying benefits to humans from
9 reduced fire risks and some forest products; (2) fairly compares the advantages and
10 disadvantages of the 2001 versus the 2004 Framework. SNFPA 3286-92, 3346-50.

11 Further, Appendix E to the SEIS summarizes and responds to the three science
12 consistency critiques of the draft SEIS, including detailed comments and responses on spotted
13 owl, fisher, and marten matters (at SNFPA 3512-23). This includes disclosing the science
14 consistency team's view that "Alternative S2 likely incurs greater risk to owl persistence," and
15 the response that final SEIS includes increased "discussion on short-term effects and associated
16 risks." SNFPA 3523. Volume 2 of the SEIS provides additional disclosure of different
17 viewpoints about impacts on owls, and responds to those viewpoints. SNFPA 3606-16.
18 NEPA was satisfied because the SEIS: (1) states "there is some risk of negatively affecting
19 California spotted owls in the short term"; and (2) puts a magnitude ceiling on that short-term
20 risk in finding the 2004 Framework still provides sufficient habitat to ensure viable populations
21 of owls. SNFPA 3350; *see* SNFPA 3011 (ROD at 21) and 4061-64 and 4076-77 (Chief's
22 Appeal Dec.).

23 For all these reasons, Plaintiff has no persuasive claim on non-disclosure of different
24 viewpoints. Plaintiff is either fly-specking an adequate EIS or is objecting to the substance of
25 the 2004 Framework. In either case, the claims fail under NEPA's deferential "rule of reason"
26 and NEPA's procedural nature. At bottom, Plaintiff is encouraging the Court to overrule the
27 Forest Service on the substance of the 2004 Framework. Mr. Lockyer's view of the "risk-
28 benefit" ratio favors the 2001 Framework. But, NEPA does not allow such substantive review.

1 *Robertson*, 490 U.S. at 349-53; *Metropolitan Edison Co. v. People Against Nuclear Energy*,
2 460 U.S. 766, 774-76, 779 (1983).

3 **4. The Impacts Of Timber Harvesting Were Adequately Described**
4 **In The Programmatic NEPA Documents.**

5 Plaintiff (at 41-42) asserts the 2004 SEIS “failed to analyze the impacts of substantially
6 increasing timber harvesting.”⁹ Yet, forest plans and the Framework plan amendment here do
7 not commit to particular forest thinning and timber harvesting projects. Such later projects will
8 have their own NEPA analysis (unless covered by a categorical exclusion). *See Ohio Forestry*
9 *Ass’n v. Sierra Club*, 523 U.S. 726, 729-33 (1998). The SEIS on the 2004 Framework provides
10 an adequate discussion of timber thinning and harvesting impacts for an initial NEPA
11 document. While the Lockyer Br. (at 41) alleges there are “only limited” discussions of the
12 impacts of the “increase in timber harvesting...scattered throughout” the SEIS., the *vast*
13 *majority* of the analytical sections of the SEIS address the impacts of increased timber thinning
14 and of harvesting under the QLG Pilot Project on old forest ecosystems, on fire and fuels and
15 forest health, on aquatic ecosystems and air and soil quality, on the viability of different
16 species, and on socio-economics. *See* SNFPA 3166-78, 3264-3392. The Lockyer Br. does not
17 identify any specific impact that was ignored in the SEIS. Given the programmatic nature of
18 the Framework, the SEIS could not address impacts which depend on later site-specific
19 decisions. For all these reasons, the Court should find the SEIS adequate on the impacts of
20 timber thinning and harvesting.

21 **5. Alternatives Were Adequately Discussed And Considered.**

22 The Lockyer Br. (at 19-23) argues the SEIS should have considered a number of variations
23 that are part way between the 2001 Framework and the 2004 Framework. However, NEPA
24 only requires a discussion of a reasonable “range of alternatives” – “NEPA does not require a

25
26 ⁹ The 2004 Framework “increases” commercial timber production only compared to the
27 2001 Framework, and only in the QLG Pilot Project area. When compared to the timber
28 production levels formerly in the SN forest plans, the 2004 Framework dramatically *decreases*
the purposeful production of timber to meet U.S. consumer demand. *See* CFA Br. at 30-32, 38-
42.

1 separate analysis of alternatives which are not significantly distinguishable from alternatives
2 actually considered.” *Headwaters v. BLM, Medford Dist.*, 914 F.2d 1174, 1181 (9th Cir. 1990);
3 *see Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1181 (9th Cir. 2000). The
4 NEPA discussion of that range of alternatives and impacts provides authority to select a sub-
5 alternative within that range. *See Northern Plains Resource Council v. Lujan*, 874 F.2d 661,
6 666 (9th Cir. 1989). For this reason, the SEIS did not have to address the sub-alternatives in
7 the Lockyer Br. (at 22-23) in depth, and provided enough consideration of them in the SEIS at
8 92-93 (SNFPA 3164-65).¹⁰

10 **IV. CONCLUSION**

11 The 2004 Framework should not be set aside based on the claims in the Lockyer brief.
12 The opening Lockyer Br., unlike the Campaign Br., provides no substantive argument as to
13 why the 2004 Framework should be set aside. Plaintiffs assert only curable procedural errors
14 under the APA and NEPA. Even if some of those claims are found persuasive, “[b]edrock
15 principles of administrative law preclude [a court] from declaring that [the Forest Service] was
16 arbitrary and capricious without first affording [the agency] an opportunity to articulate, if
17 possible, a better explanation.” *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C.
18 Cir. 1999). Further, a procedural NEPA violation does not compel an injunction. *Fund for*
19 *Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992). Because Plaintiff has not sustained its
20 burden of demonstrating that extraordinary injunctive relief is warranted, the 2004 Framework
21 should remain in place pending any further required analyses. A return to the substantive
22 provisions of the 2001 Framework would completely undermine the Congressional mandates
23 found in the HFQLG Act by: (1) reinstating an owl habitat management strategy that was not
24 legitimately founded in science; (2) preventing implementation of acceptable standard of
25 effective fire protection under the Act, (3) preventing the group selection silviculture on the
26 landscape mandated for fire protection in the Act, (4) interfering with the program of riparian
27 restoration specified in the Act by adding large Critical Aquatic Reserves (CARs) to HFQLG

1 Forests, and (5) failing to provide realistic considerations of the social and economic effects
2 that would result locally and nationally from Framework implementation.

3 A return to the 2001 Framework would be to rule against current science and against the
4 will of Congress. We respectfully ask that you deny the Lockyer motion for summary judgment
5 and grant the Federal cross-motion for summary judgment.

6
7 Respectfully submitted on January 6, 2006

s/ Michael B. Jackson

8 Michael B. Jackson

9 for Intervenors-Defendants
10 Quincy Library Group and
11 Plumas County

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