MICHAEL R. SHERWOOD, State Bar No. 63702
GEORGE M. TORGUN, State Bar No. 222085
Earthjustice
426 17th Street, 5th Floor
Oakland, CA 94612
(510) 550-6725

Attorneys for Plaintiffs Sierra Nevada Forest Protection Campaign and Plumas Forest Project

RACHEL M. FAZIO, State Bar No. 187580
John Muir Project
P.O. Box 697
Cedar Ridge, CA 95924
(530) 273-9290

Attorney for Plaintiffs Earth Island Institute and Center for Biological Diversity

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

SIERRA NEVADA FOREST PROTECTION CAMPAIGN, *et al.*, Plaintiffs, vs. UNITED STATES FOREST SERVICE, *et al.*, Defendants, and QUINCY LIBRARY GROUP, an unincorporated citizens group; and PLUMAS COUNTY, Intervenors/Defendants.	Case No. Civ. S-04-2023 LKK/PAN PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' EXTRA-RECORD DECLARATIONS AND IN SUPPORT OF FURTHER SUPPLEMENTATION OF THE RECORD Date: April 5, 2005 Time: 1:30 p.m. Judge: Hon. Lawrence K. Karlton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

This case involves a challenge to the decision by defendants United States Forest Service, *et al.* ("Defendants") to approve a logging project within the Plumas National Forest, California, called the Meadow Valley Defensible Fuel Profile Zone and Group Selection Project ("Meadow Valley Project" or "Project"). In Support of their Motion for Summary Judgment, filed on December 17, 2004, Plaintiffs submitted several declarations and attached documents. On January 28, 2005, Defendants filed a Motion to Strike Plaintiffs' Extra-Record Declarations and Memorandum In Support ("Def. Mem."), seeking to strike the Declarations of Dennis C. Odion, Monica L. Bond, Jennifer A. Blakesley, and Chad T. Hanson, as well as attachments 4 through 9 to the Declaration of George M. Torgun. Defendants claim that these declarations and documents were not part of the administrative record filed by Defendants in this case and as such, should not be considered by this Court.

However, as explained below, all of the extra-record evidence submitted by Plaintiffs is properly before the Court since it falls within the well established exceptions to the "record review rule." Plaintiffs' extra-record evidence is necessary to aid the court in the understanding of technical and complex scientific matters, to fill holes in the record where Defendants simply failed to consider all relevant factors, to fully explain the agency's decision, to ensure that an adequate discussion of environmental effects has been completed by the agency, and to support Plaintiffs' allegations that "serious environmental consequences" have not been adequately addressed.

This Memorandum also serves as support for Plaintiffs' request to further supplement the administrative record with the following documents: (1) Supplemental Declaration of Dr. Dennis Odion in Support of Plaintiffs' Motion for Summary Judgment; (2) excerpts from the CASPO Technical Report; (3) excerpts from the SNEP Report; (4) a digitized copy of the Basin Wildlife Map; (5) an excerpt from the Basin Project Environmental Assessment; and (6) *Center for Sierra Nevada Conservation v. Berry*, No. Civ. S-02-325 LKK/JFM (E.D. Cal. Feb. 15, 2005).

ARGUMENT

I. Exceptions to the Record Review Rule

While it is true that as a general matter, the scope of judicial review of agency action is

limited to review of the administrative record, it is equally true that courts have long recognized that exceptions to this general rule must be made. *See, e.g., Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986) (citing *Asarco, Inc. v. United States Environmental Protection Agency*, 616 F.2d 1153, 1159 (9th Cir. 1980)) ("But exceptions exist to the rule that review of agency action is limited to the administrative record. A court may consider evidence outside the administrative record *as necessary* to explain agency action") (emphasis added); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *modified* 867 F.2d 1244 (9th Cir. 1989); *Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (a reviewing court can go outside the administrative record "to determine whether the agency considered all the relevant factors").

The informed capacity of a court sitting in review of agency action would be frustrated if courts were unconditionally restricted to the agency's designated record. Thus, courts may inquire beyond the administrative record under certain well-established exceptions to the general "record review" rule. *See National Audubon Soc'y v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 (9th Cir. 1993). The Ninth Circuit has acknowledged five exceptions to the record review rule wherein proffered extra-record evidence is admissible if *any* of the following criteria are met: (1) "where necessary to explain the agency's actions," especially when the record is so inadequate as to frustrate judicial review[1]; (2) to determine "whether the agency has considered all relevant factors or has explained its course of conduct or grounds of decision"; (3) when the agency has relied on documents not in the record; (4) when supplementing the record is "necessary to explain technical terms or complex subject matter"; and (5) when plaintiffs have made a showing of agency bad faith. *Hodel*, 840 F.2d at 1436-37. *See also Thompson*, 885 F.2d at 555 ("The reviewing court can go outside the administrative record . . . to determine whether the agency considered all the relevant factors"); *Hells Canyon Preservation Council v. Jacoby*, 9 F. Supp. 2d 1216, 1221-23 (D. Or. 1998) (articulating the exceptions to the record review rule).

[1] Contrary to Defendants' assertions (Def. Mem. at 6), the Court may go beyond the record if any of the five circumstances listed above are met. The statement in *Hodel* regarding an agency record being so inadequate as to frustrate judicial review is not a prerequisite to the admission of all extra-record evidence, but merely qualifies the "explain agency action" criteria (*i.e.*, where the record is so lacking that without supplementation the Court cannot ascertain why the agency did what it did).

In addition to these exceptions, with regard to cases involving the National Environmental Policy Act ("NEPA"), "a district court may extend its review beyond the administrative record and permit the introduction of new evidence in NEPA cases where the plaintiff alleges 'that an [environmental impact statement ("EIS")] has failed to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism under the rug.'" *See National Audubon Soc'y*, 46 F.3d at 1447 (*citing Hodel*, 840 F.2d at 1436, *applying County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1384-85 (2d Cir. 1977)).

Courts within the Ninth Circuit have routinely admitted extra-record evidence in NEPA cases. *See, e.g., Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 n. 22 (9th Cir. 1992); *City of Davis v. Coleman*, 521 F.2d 661, 675 (9th Cir. 1975); *Natural Resources Defense Council v. Duvall*, 777 F. Supp. 1533, 1534 n. 1 (E.D. Cal. 1991) (all allowing new materials to show that the agency failed to consider all relevant factors); *National Audubon Society*, 46 F.3d at 1448 (expert declaration admitted on "serious environmental consequence" which plaintiffs alleged the Forest Service failed to mention in analysis); *Environment Now! v. Espy*, 877 F. Supp 1397, 1404 (E.D. Cal. 1994) (allowing expert declarations to highlight perceived deficiencies in the environmental review process and explain and assist understanding the complex and technical subject matter underlying the agency decision); *San Luis & Delta-Mendota Water Authority v. Anne Badgley*, 136 F. Supp. 2d 1136, 1143-45 (E.D. Cal. 2000) (same); *Blue Oceans Preservation Soc'y v. Watkins*, 767 F. Supp. 1518, 1527 (D. Haw. 1991) (accepting affidavits from plaintiffs' experts); *Portland Audubon Society v. Lujan*, 712 F. Supp. 1456, 1476 (D. Or. 1989), *aff'd in part, rev'd in part on other grounds*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); *Californians for Alternatives to Toxics v. Dombeck*, No. Civ. S-00-605 LKK/PAN (E.D. Cal. June 12, 2001) ("*CATS I*") (permitting expert testimony of Dr. Radosovich to establish that defendants failed to analyze the serious environmental consequence of maintaining DFPZs); *Greenpeace U.S.A. v. Evans*, 688 F. Supp. 579, 584 (W.D. Wash. 1987) (permitting introduction of plaintiffs' expert declarations); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983). In fact, a district court within the Ninth Circuit noted that "the admission of extrinsic evidence on the issue of adequacy of

an EIS appears to be the normal practice in the Ninth Circuit." *No Oilport! v. Carter*, 520 F. Supp 334, 346 (W.D. Wash. 1981).

Further, sister circuits have repeatedly endorsed this presumptive "NEPA Exception" to the record review rule. As the Second Circuit explained:

> Generally, however, allegations that an…[EIS] has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn or serious criticism...under the rug ...raises issues sufficiently important to permit the introduction of new evidence by the district court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement is necessary.

County of Suffolk, 562 F.2d at 1384-85 (*County of Suffolk* test adopted by the Ninth Circuit in *National Audubon Soc'y*, 46 F.3d at 1448); *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 369 n.56 (D.C. Cir. 1981) (because NEPA suits "seek to ensure compliance with a statute other than the APA," allegations that an agency "fail[ed] to consider serious environmental consequences or realistic alternatives raise issues sufficiently important to warrant introduction of new evidence in the District Court"); *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 72 (D.C. Cir. 1987) (same); *Webb v. Gorsuch*, 699 F.2d 157, 159 n. 2 (4th Cir. 1983); *Como-Falcom Coalition, Inc. v. United States Dept. of Labor*, 465 F. Supp. 850, 856 n. 1 (D. Minn. 1978) ("If the federal agency has overlooked or inadequately assessed a possible adverse environmental impact, it is unlikely that the deficiency will be apparent from the examination of the record itself. Given the scheme of NEPA and the scrutiny with which the judiciary must eye negative assessments of environmental impact, a reviewing court cannot be restricted to the administrative record"), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980). Under this exception, "courts generally have been willing to look outside the record when assessing the adequacy of an EIS or a determination that no EIS is necessary." *Id*.; *see generally*, Susannah French, JUDICIAL REVIEW OF THE ADMINISTRATIVE RECORD IN NEPA LITIGATION, 81 Calif. L. Rev. 929, 948-958 (July 1993).

II. Judicial Review under NEPA

As the U.S. Supreme Court has noted, judicial review under NEPA requires the court to engage in a "substantial inquiry" into the nature of a federal agency's NEPA compliance. *See*

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). Because NEPA claims often involve impacts that are brushed aside, with a resulting absence in the record of documentation addressing them, the NEPA exception to extra-record evidence (as detailed *supra*) is vital to ensure that courts take the requisite "careful and searching review" of the agency's actions. *Id* at 416. In fact, the Ninth Circuit has found that it "cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered relevant matters." *Ascaro,* 616 F.2d at 1160 ("[I]t is both unrealistic and unwise to 'straightjacket' the reviewing court with the administrative record. It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not"); *see also National Audubon Soc'y,* 46 F.3d at 1447-48 (district court properly considered extra-record evidence based on allegations that Forest Service "neglected to mention a serious environmental consequence in preparing the environmental assessments on the four challenged timber sales") (citations omitted).

III. Plaintiffs' Extra-Record Evidence is Proper

In this litigation, Plaintiffs are challenging, among other things, Defendants' failure to prepare an EIS for the Meadow Valley Project. This challenge is centered upon Plaintiffs' allegations that significant environmental impacts were ignored by the Defendants when they chose to evaluate this Project through preparation of an Environmental Assessment ("EA"). Plaintiffs further challenge the adequacy of the EA on the grounds that Defendants failed to adequately consider cumulative impacts to the California spotted owl. Thus, Plaintiffs' NEPA claims are in large part grounded on the fact that Defendants ignored critical environmental considerations of the proposed action. In addition, Plaintiffs are alleging that the Project violates the Herger-Feinstein Quincy Library Group Forest Recovery Act ("QLG Act"), specifically with regard to the technical and complex subject matter of fire resistance and fire resiliency of a forest and/or forest stand, and again focus in large part on topics which the Forest Service failed to address, such as the risk to human health and safety, as well as to the environment, of failing to clean up slash debris.

In addition to challenging Plaintiffs' declarations on the grounds that they do not fit within

the well-established exceptions to the record review rule, Defendants offer two additional arguments that must also fail. First, Defendants argue that the declarations should be excluded because they were written after the decision to approve the Meadow Valley Project was made, and are thus "post-decisional documents." Def. Mem. at 8-9. Defendants rely mainly upon *Southwest Center for Biological Diversity v. United States Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996) to support this assertion. However, *Southwest Center* does not stand for the proposition that declarations by experts which explain technical and complex subject matter, identify and fill holes within the record, assist in the determination of whether the agency considered all relevant factors and support Plaintiffs' allegations that the agency failed to address serious environmental consequences, should be excluded. In *Southwest Center*, Plaintiffs attempted to submit an agency document (not an expert declaration) that detailed interagency consultation procedures required for compliance with the federal Endangered Species Act in salvage timber sales under the Rescissions Act, procedures which were not utilized by the agency in reaching the decision which Plaintiffs were challenging. However, that document was prepared and distributed by the agency after the decision on the timber sale at issue in the case was made, and plaintiffs were hoping to convince the court that this "post-decisional document" retroactively invalidated the actions of the Forest Service. In this case, Plaintiffs are not using declarations to rationalize that the decision to approve the Meadow Valley Project is wrong today, but was not wrong at the time it was made. Instead, Plaintiffs have alleged that the decision violated federal law on the day it was signed.

Defendants' final argument relates to the persuasiveness of Plaintiffs' expert declarations regarding fire and impacts to California spotted owls, should they be admitted. Def. Mem. at 7-8. This argument will be addressed following the discussion below, which illustrates how each of the challenged declarations fits within the exceptions to the record review rule.

A. Declaration of Dr. Dennis Odion

Plaintiffs' claims dealing with fire risk, on which Dr. Odion offers testimony, include their QLG Act claim that the Meadow Valley Project fails to demonstrate the effectiveness of group selection logging to create a more fire resilient forest, as well as their NEPA claims that an EIS was necessary because there are potentially significant impacts to human health and safety and scientific

controversy surrounding the effects of the proposed action on fire severity in the Project area. This topic of fire, which includes fire risk, fire severity, fire resilience and fire behavior, involves complex subject matter and technical terms that are in need of explanation. As such, much of Dr. Odion's declaration falls within the fourth exception to the record review rule (supplementation of the record allowed to explain technical terms or complex subject matter).

In addition, Defendants failed to conduct an analysis of the consequences of leaving slash debris in logging units and the impact of this on the "effectiveness" of group selection in creating a more fire resilient stand. To the extent that Dr. Odion's testimony involves discussion of slash debris, it falls within the second exception to the record review rule (supplementation allowed to determine whether the agency has considered all relevant factors or has explained its course of conduct or grounds of decision).

Finally, to the extent that Dr. Odion's testimony supports Plaintiffs' allegation that Defendants failed to mention a serious environmental consequence, for example, the increased risk of fire from the proposed logging activities, his testimony falls within the NEPA exception applied in *National Audubon Soc'y,* 46 F.3d at 1149.

- Paragraphs 1-2 as well as Exhibit A (a copy of Dr. Odion's curricula vitae) pertain to Dr. Odion's qualifications as an expert and are properly before this court. *See* S*an Luis & Delta-Mendota,* 136 F. Supp. 2d at 1145 (*citing* Federal Rule of Evidence 702).
- Paragraph 3 is admissible as extra record evidence because it discusses the serious consequence which Defendants neglected to mention (namely, that group selection logging as proposed will make the area more fire prone), and thus satisfies the NEPA exception as identified in *National Audubon Soc'y.* In addition, this paragraph frames the discussion of the complex subject matter found through out the declaration and thus is properly before the court under the fourth exception (complex subject matter/technical terms).

- Paragraph 4 satisfies both the NEPA exception and the fourth exception because it supplies testimony as to how group selection logging will increase fire risk and severity, and provides a discussion of the self-reinforcing relationship between chaparral/brush and fire behavior.
- Paragraph 5 also satisfies the NEPA exception and the fourth exception. This paragraph also discusses the serious consequences, which Defendants ignored, of increased fire risk from the implementation of this Project, defines the technical term "combustion," and explains the process of combustion in a forest ecosystem.
- Paragraph 6 meets the NEPA exception because it deals with the propensity of this Project to increase fire risk. This paragraph also fits into the fourth exception as it explains positive feedback between chaparral/shrub growth and fire behavior, including reference to a figure of the conceptual model of positive feedback.
- Paragraph 7 meets the NEPA exception, the fourth exception, and the second exception (consideration of relevant factors). This paragraph discusses the spatial proximity of the group selection units and the effect this has on fire severity, as well as the positive feedback loop. It once again contains information relevant to Plaintiffs' allegation of failure to mention the increased fire risk from this Project and touches on the cumulative impacts of this Project in association with a known future project (i.e., the Basin Project), which Defendants chose to ignore in their preparation of the Meadow Valley EA.
- Paragraphs 8-10, 12, 20, and 24-25 all meet the NEPA exception as they deal with a discussion of increased fire risk from the Project, and all meet the fourth exception since they include an explanation of the complex relationship between slash and fire severity. In addition, each paragraph meets the second exception in that it discusses a relevant factor which the Project documents ignored, namely that slash from the Project will remain on site and will increase fire severity in the area.

- Paragraph 11 falls under the fourth exception as it defines the technical terms "fire resilient" and "fire resistant," and clarifies the terminology as stated in the EA and as applied by the Forest Service. This paragraph also falls under the second exception as it aids in discussion of whether the agency explained its grounds of decision, i.e., how group selection as planned by Defendants results in a fire resilient/fire resistant forest.
- Paragraph 13 is admissible under the fourth exception as it explains the effect of canopy reduction on microclimate and issues of combustion. This paragraph deals once again with the increased risk of fire from Defendants' activities and as such also falls within the NEPA exception.
- Paragraphs 14-19 and 21-23 are paragraphs which Defendants object to as being irrelevant. These paragraphs establish the serious consequences of the Defendants' failure to address the increased fire risk that will result from the Meadow Valley Project. These paragraphs fall directly within the NEPA exception, as Plaintiffs have alleged that Defendants neglected to mention these consequences.

In addition, the submission by Defendants of the Declaration of Carl N. Skinner, a person who was not involved in the preparation of the environmental documents for the Meadow Valley Project, to rebut Dr. Odion's testimony is a tacit admission on the part of the Defendants that this subject matter is technical and complex and needs explanation beyond that provided in the administrative record in order for the Court to fully understand the actions taken by the agency and to determine whether said actions were arbitrary and capricious.

Plaintiffs' allegations are sufficient to allow the introduction of Dr. Odion's declaration. *See Hells Canyon*, 9 F. Supp. 2d. at 1224 (permitting introduction of expert declaration containing opinions regarding the deficiencies and flaws contained in an environmental analysis).

The Ninth Circuit has repeatedly permitted such testimony in the past. For example, in *National Audubon Soc'y*, the Ninth Circuit upheld a district court decision permitting consideration of extra-record declarations. 46 F.3d at 1149. In that case, environmental plaintiffs challenged the

Forest Service's EAs and FONSI for four timber sales, arguing that the Forest Service "neglected to mention a serious environmental consequence" in preparing the EAs. *Id.* at 1448. In support of their allegations, Plaintiffs proffered an affidavit from their own expert, who claimed that the Forest Service overlooked an important environmental consideration. Both the district court and the Ninth Circuit found that the affidavit fell within the exception to the record review rule. *Id.*

The present case cannot be meaningfully distinguished from *National Audubon Soc'y*, *Hells Canyon*, or the other cases cited *supra*. In the present case, Plaintiffs seek to introduce Dr. Odion's extra-record evidence to (1) explain Defendants' proposed actions; (2) establish that Defendants have failed to explain the scientific grounds of their decision and that Defendants' scientific opinions are unreasonable; and (3) explain the complex relationship between Defendants' proposed actions and fire behavior, fire risk, and fire resilience.

Under the well-established exceptions to the record review rule, Defendants' Motion to Strike both the Declaration of Dr. Dennis Odion and associated passages in Plaintiffs' briefs must fail.

B. Declarations of Monica Bond and Dr. Jennifer Blakesley

The declarations of Monica Bond ("Bond Dec.") and Jennifer Blakesley ("Blakesley Dec.") are also properly before this Court. The entirety of Ms. Bond's and Dr. Blakesley's declarations should be admitted, as the paragraphs of the declarations fall into one or all of the following exceptions: the established NEPA exception to the record review rule (*see, e.g., Hells Canyon*, 9 F. Supp. at 1216, 1223); the second of the established Ninth Circuit exceptions, to determine whether the agency has considered all relevant factors; and the fourth of the established Ninth Circuit exceptions, to explain technical information and complex subject mater. *See National Audubon Soc'y*, 46 F.3d at 1447.

Both declarations identify relevant factors that Defendants have failed to consider with regard to the impacts the Project will have on the California spotted owl. These declarations also support Plaintiffs' allegations that the Defendants should have prepared an environmental impact statement, rather than an EA, due to the potentially significant impacts the Project will have on the owl, especially in relation to other past, present and future projects. The declarations further explain

to the Court why these failures have resulted in an inaccurate assessment of impacts, and why additional analysis must be prepared in order to determine the extent of impacts to this species from Defendants' actions.

Contrary to Defendants' assertions (Defs. Mem. at 7), expert testimony not only involves the recitation of definitions and/or the explanation of complex subject matter, but also the expert's opinion as to why such definitions and explanations matter in the context of the case. Their purpose is to assist the Court in its determination of whether an agency considered all relevant factors, and as such this testimony must be allowed to explain why these factors are relevant to the decision made by the agency.

For example, the Forest Service has determined that the Meadow Valley Project will have no significant impact on the California spotted owl. AR 15 at 05637. This assessment is based on one main conclusion, that the Project won't reduce spotted owl occupancy. *Id.* Both the Bond and Blakesley declarations offer testimony to explain to the court why this conclusion is inaccurate, providing necessary background information and concentrating on the factors that Defendants failed to consider in reaching this conclusion. First, Ms. Bond and Dr. Blakesley offer their credentials to establish why the Court should accept their testimony and how they prepared to testify. Bond Dec., ¶¶ 1-3, 14, and Ex. A-B; Blakesley Dec. ¶¶ 1-3 and attached curriculum vitae. They then spend time explaining for the Court:

a. The complex subject matter of spotted owl biology;

b. The relationship between California spotted owls and their habitat;

c. Habitat needs of the species for survival (including structure of the forest, and amount of suitable habitat necessary for survival, reproduction, dispersal, etc.) (Bond Dec., ¶¶4,6,7,8,10, 17,18; 28-29; Blakesley Dec., ¶¶6-10, and 16);

d. Owl behavior in general as well as the effects of habitat reduction on owl behavior and survival (on both the landscape and the individual home range and core area levels) (Bond Dec. ¶¶ 4, 5, 10, 17-18, 22, 33 and 36; Blakesley Dec. ¶¶ 10, and 16-17.);

e. Mate-finding, offspring and dispersal (Bond Dec. ¶¶ 30; 32-33, and 36; Blakesley Dec. ¶ 9.);

f. Foraging and food base (Bond Dec. ¶¶ 23-27, 33 and 36); and

g. Relevant scientific literature on California spotted owl populations in general and in the Northern Sierra Nevada in particular (Bond Dec., ¶¶ 16-17; Blakesley Dec., ¶¶ 3-4 and 8-9).

In addition, their testimony focuses on explaining technical terms such as viability (Bond Dec. ¶ 20; Blakesley Dec. ¶ 4); home range (Blakesley Dec. ¶ 6); biological home range core area (Bond Dec. ¶¶ 5 and 37; Blakesley Dec. ¶ 6); administrative home range core area (Bond Dec. ¶¶ 10, 21 and 31; Blakesley Dec. ¶ 6); administrative protected activity center (Bond Dec. ¶¶ 9 and 31; Blakesley Dec. ¶ 7); and true activity centers (Blakesley Dec. ¶ 8). They also include discussion of information regarding the Meadow Valley Project relevant to California spotted owls (Bond Dec. ¶¶ 11-14, 24, 19-20 and 31-32) and planned future projects, which Defendants fail to acknowledge or analyze in their environmental documents (Bond Dec. ¶ 40; Blakesley Dec. ¶¶ 12-15).

All of this information illuminates the relevant factors Defendants failed to consider, and support the opinions offered by Ms. Bond and Dr. Blakesley as to why the analysis (or lack thereof) in the Project documents does not support a finding of no significant impact to the owl. Bond Dec. ¶¶ 15,19, 34-35, and 38-42; Blakesley Dec. ¶¶ 5, 7, and 18.

As described above, the declarations of Monica Bond and Dr. Jennifer Blakesley fall into several exceptions to the record review rule and in addition should be helpful to the Court in determining whether Defendants considered all relevant factors in approving the Meadow Valley Project without preparation of an Environmental Impact Statement. As such Plaintiffs request that the Court deny Defendants' Motion to Strike both these declarations and any references to them in Plaintiffs' briefs.

Defendants also support their Motion to Strike the aforementioned declarations by claiming that "courts must give deference to the reasonable opinions of the agency's own qualified experts." Def. Mem. at 7-8 (citing *Marsh v. ONRC*, 490 U.S. 360, 378 (1989)). However, expert opinions are only entitled to deference if they are from qualified experts and their opinions are reasonable. *Price*

Road Neighborhood Association, Inc. v. United States D.O.T., 113 F.3d 1505, 1511 9th Cir. 1997) (cites omitted)). In this case, given the relevant factors with regard to fire behavior and owls which the agency ignored in making its decision, any opinions offered by the Forest Service's supposed experts cannot be seen as reasonable. In addition, to the best of Plaintiffs' knowledge, Ms. Bond and Dr. Blakesley are the only qualified spotted owl biologists that have reviewed this Project. In any event, an agency is not allowed to hide behind its experts' conclusions in an effort to support a decision that is arbitrary and capricious. 5 U.S.C. 706(2)(A); *Idaho Sporting Congress v. Thomas,* 137 F.3d 1146, 1149 (9th Cir. 1988); *Greenpeace Action v. Franklin,* 14 F.3d 1324, 1331 (D. Or. 1992).

While agency decisions are afforded deference, these decisions are not unimpeachable and a probing and thorough inquiry by the reviewing court is necessary to determine whether there is a rational connection between the facts and the agency determination. *Baltimore Gas and Electric v. NRDC,* 462 U.S. 87 (1983*)* (citing *Bowman Transportation Inc. v. Arkansas-Best Freight System,* 419 U.S. 281, 285-86 (1974)). The decisions must be based upon evidence contained in the record and demonstrate a rational connection between the facts found and the decision made. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971); *see also Tribal Village of Akutan v. Hodel,* 869 F.2d 1185 (9th Cir. 1988).

As the Supreme Court opined when faced with a circumstance wherein there were no findings and no analysis to justify the choice made by the agency:

> We are not prepared to and the Administrative Procedures Act will not permit us to accept such . . . practice . . . Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of the modern government, can become a monster which rules with no practical limits on its discretion.

Motor Vehicle Manufacturers Association v. State Farm Mutual, 463 U.S. 29, 48 (1983) (adopting dissenting opinion in *New York v. United States*, 342 U.S. 882, 884 (1951)).

C. Supplemental Declaration of Chad Hanson

Chad Hanson's Supplemental Declaration ("Hanson Supp. Dec.") is also properly before this Court. In his Supplemental Declaration, Mr. Hanson identifies the failure by Defendants to divulge

or analyze in the EA the consequences of intensively logging areas within the Meadow Valley Project area which had previously been treated with hand thinning and/or underburning. Paragraphs 1-6 and exhibits A-G of the Hanson Supp. Dec. authenticate and provide photographs of these pre-treated areas scheduled for group selection logging. This submission falls within the second exception, as well as the NEPA exception, because it illustrates a circumstance wherein the agency failed to consider a relevant factor in reaching its decision. This evidence should be admitted and considered by this Court.

Paragraph 7 and the corresponding Exhibit H of the Hanson Supp. Dec. refer to the Administrative Appeal of the 2004 Sierra Nevada Forest Plan Amendment Record of Decision ("SNFPA 2004 ROD") filed by Plaintiff Earth Island Institute. Defendants have already agreed that the NEPA documents regarding the SNFPA 2004 ROD are part of the record, including the Final Supplemental Environmental Impact Statement and Record of Decision. *See* AR 4 and 5 at 1050-1767. Plaintiffs' Administrative Appeal is part and parcel to this decision, was in existence at the time the Meadow Valley Project was being planned, and should have been submitted as part of the record.

D. Attachments 4-9 to the Declaration of George Torgun

Attachments 4-9 to the Declaration of George Torgun ("Torgun Dec.") are relevant to the Meadow Valley Project and are necessary for the Court to determine whether the Forest Service adequately considered the cumulative impacts of the Project and other reasonably foreseeable future actions. These documents all pertain to similar QLG Act pilot projects that were planned adjacent to or near the Meadow Valley Project at the time the Meadow Valley Project Decision Notice was signed on April 16, 2004. As a result, these documents are necessary for the Court to determine whether the Forest Service considered all of the relevant factors under NEPA in the Meadow Valley Project EA, or adequately explained its decision that the impacts of the Project and other reasonably foreseeable future actions were not cumulatively significant and did not require the preparation of an EIS. *See National Audubon Soc'y*, 46 F.3d at 1447-48.

The fact that Defendants are objecting to these documents being part of the record resonates with Plaintiffs' claim that the agency failed to conduct a proper cumulative effects analysis, because

if the documents were in the record, Defendants' failure to analyze the current Project in light of these other projects would be glaringly obvious. Defendants arbitrarily failed to submit these documents as part of the record, and failed to respond to Plaintiffs' comments submitted on the Project regarding the cumulative impacts to the California spotted owl from these reasonably foreseeable future logging projects. *See* AR 15 at 5461. As a result, the Court has no choice but to go outside the record in order to ascertain whether the Forest Service complied with the requirements of NEPA, and these documents and all references to them should be admitted and may properly be considered by this Court.

IV. Plaintiffs' Additional Submissions to Supplement the Record are Proper

A. Excerpts from the CASPO Technical Report and SNEP

The excerpts submitted by Plaintiffs attached to the Declaration of Rachel Fazio ("Fazio Dec.") as Attachments 1 and 2 are from the California Spotted Owl Technical Report (1992), ("CASPO Technical Report") and the Sierra Nevada Ecosystem Project Report ("SNEP Report"). Portions of the CASPO Technical Report have already been designated as part of the Administrative Record by Defendants (AR 10 at 3688-3694), and excerpts of the SNEP Report have been attached to the Declaration of Carl Skinner and relied upon by Defendants in their brief (Skinner Dec. Attachment 2; Def. Br. pp. 38-42). These documents have clearly been relied upon by the Forest Service in approving the Meadow Valley Project and justifying their decision to this Court. As such, the entirety of these documents (not just portions thereof) should be considered part of the administrative record. Based on the foregoing, Plaintiffs request that the excerpts of both the CASPO Technical Report and the SNEP Report attached to the Fazio Dec. should be accepted and considered by this Court.

B. The Basin Wildlife Map

The attached map is a true and correct copy[2] depicting the Basin Group Selection Project area, which Defendants acknowledge to be adjacent to the Meadow Valley Project. Def. Answer to Complaint ¶ 63. On this map, planned group selection units are indicated by small green triangles, and spotted owl PACs and SOHAs are delineated as described in the legend. The Basin Project was

in development prior to the decision issued for the Meadow Valley Project. Torgun Dec., Attachment 8. This map, dated March 18, 2004, almost one month prior to the issuance of the Meadow Valley Project Decision Notice (AR 15 at 05493, signed April 16, 2004), graphically depicts planned logging operations as well as owl sites within and near the Basin Project area. In addition, its existence makes Plaintiffs' point that the Forest Service had full knowledge of "future projects . . . similar" to the Meadow Valley Project (AR 15 at 05504) that might increase the risk of cumulative effects to the owl from the Meadow Valley Project prior to their decision, and yet failed to disclose this knowledge to the public or assess the impacts of this reasonably foreseeable project in the Meadow Valley Project documents.

This map falls within both the NEPA exception as well as the second exception, as it will assist the Court in its determination of whether the Forest Service considered all relevant factors in making its decision. The map also supports Plaintiffs' allegation that Defendants failed to analyze the serious potential environmental consequences to the California spotted owl from implementing both the Meadow Valley Project and the adjacent Basin Project contemporaneously. As such this document should be admitted and all references to it within Plaintiffs' Opening and Response/Reply briefs should be allowed.

C. Excerpts from the Basin Project Environmental Assessment

As stated above, the Basin Project was in the planning stages prior to the issuance of the Meadow Valley Project Decision Notice. The pages excerpted from the Basin Project Environmental Assessment, which proposes group selection logging identical to that prescribed by the Meadow Valley Project, support Plaintiffs' contention that the Forest Service failed to analyze the serious environmental consequence of increasing the risk of severe fire in the Project area from their proposed group selection logging. The cited passage indicates that removing most trees 11-24" in diameter from group selection units and replacing these mature stands with new stands would generate hazardous fuels conditions until the new stands matured past pole size (i.e., seven to 40 years, depending on the site). As such, the document should be admitted under the NEPA exception

[2] Plaintiffs plan to bring a full size paper copy of this map to the hearing on April 5, 2005.

to the record review rule.

D. The Supplemental Declaration of Dr. Dennis Odion

As with Dr. Odion's initial declaration, Dr. Odion's Supplemental Declaration falls within established exceptions to the record review rule. Paragraphs 1 and 2 merely state Dr. Odion's credentials and rebut Mr. Skinner's assertion that Dr. Odion has not conducted research in California's forests. Skinner Dec. ¶ 21. Paragraphs 3-14 fall under the fourth exception delineated by the Ninth Circuit in *National Audubon Soc'y*, as these paragraphs further explain the complex subject matter of combustion, regeneration, disturbance, and self-reinforcing cycles of chaparral growth, as well as associated technical terms such as fire resistance and resilience. *National Audubon Soc'y*, 46 F.3d at 1447-48. In addition, paragraphs 3 through 14 fall within the second exception of *National Audubon Soc'y* because they pertain to relevant factors not discussed in the Meadow Valley Project documents, including effects of not requiring slash removal, and effects of logging pine stands, pre-treated stands and high elevation fir forests on resilience. *Id.*

Finally, paragraphs 3-14 fit within the NEPA exception adopted by the Ninth Circuit in *Animal Defense Fund* because they pertain to Plaintiffs' allegations that Meadow Valley Project documents failed to consider the serious environmental consequences of slash debris, logging pine and true fir stands, logging large trees, removing the forest overstory and logging fire treated areas on the fire resiliency of the forest. *Hodel*, 840 F.2d at 1436-37. As such, Dr. Odion's Supplemental Declaration and the portions of Plaintiffs' reply brief pertaining to it should be admitted and considered by this Court.

E. The Declaration of Dr. Don Erman

Dr. Erman's declaration is submitted by Plaintiffs to rebut Defendants' assertions that the SNEP Report and the Weatherspoon (1996) article support the Forest Service's decision to implement group selection logging as designed in the Meadow Valley Project. Dr. Erman was the Science Team Leader for SNEP and his testimony will assist the Court in determining whether the Forest Service's decision was based upon factual or scientific inaccuracies. *See Association of Pacific Fisheries v. E.P.A.*, 615 F.2d 794, 812 (9th Cir. 1980). In addition, Dr. Erman's declaration should be allowed to assist the Court in determining whether the Forest Service has considered all

relevant factors or adequately explained its grounds for decision, given that the material upon which it relies does not actually support its course of action. *See National Audubon Soc'y*, 46 F.3d at 1447.

CONCLUSION

In light of the exceptions to the record review rule, and considering the expansive treatment by the Ninth Circuit of these exceptions in NEPA cases, Plaintiffs' extra-record evidence should be admitted and considered by this Court in determining whether the Forest Service's approval of the Meadow Valley Project was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

DATED: February 28, 2005

Respectfully submitted,

/s/ Rachel M. Fazio
RACHEL M. FAZIO

Attorney for Plaintiffs Earth Island Institute and Center for Biological Diversity

/s/ George M. Torgun (as authorized on 2/28/05)
MICHAEL R. SHERWOOD
GEORGE M. TORGUN

Attorneys for Plaintiffs Sierra Nevada Forest Protection Campaign and Plumas Forest Project