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3 **UNITED STATES DISTRICT COURT**  
4 **EASTERN DISTRICT OF CALIFORNIA**  
5

6 **SEQUOIA FORESTKEEPER,**

7 **Plaintiff**

8 **v.**

9 **ERIC LA PRICE, in his official capacity as**  
10 **District Ranger for the Western Divide**  
11 **Ranger District of the Sequoia National**  
12 **Forest, et al.,**

13 **Defendants, and**

14 **SIERRA FOREST PRODUCTS, a**  
15 **California Corporation,**

16 **Intervenor-Defendant**

**CASE NO. 1:16-CV-0759 AWI JLT**

**ORDER ON CROSS-MOTIONS FOR**  
**SUMMARY JUDGMENT; PLAINTIFF'S**  
**MOTION TO ADMIT EXTRA-RECORD**  
**EVIDENCE; DEFENDANTS' MOTION**  
**TO STRIKE PLAINTIFF'S EXTRA-**  
**RECORD EVIDENCE; AND**  
**PLAINTIFF'S MOTION TO STRIKE**  
**THE DECLARATION OF JEFFREY R.**  
**CORDES**

(Doc. Nos. 47, 48, 51, 52, 53, 56)

17 This is a National Environmental Policy Act ("NEPA") and National Forest Management  
18 Act ("NFMA") case filed by Plaintiff Sequoia Forest Keeper ("SF Keeper" or "Plaintiff") against  
19 the United States Forest Service ("Forest Service") and various Forest Service employees in their  
20 official capacities (collectively, "Defendants") to halt the Frog Timber sale Project ("Frog Project"  
21 or "Frog"). Sierra Forest Products ("SF Products"), the corporation with the contract to carry out  
22 the Frog Project, is an Intervenor-Defendant. SF Keeper has brought a civil action for declaratory  
23 and injunctive relief, which stems from Defendants' ongoing actions related to the Frog Project,  
24 permitting commercial logging and other activities in what SF Keeper maintains is core habitat for  
25 the Pacific Fisher ("Fisher") in the Greenhorn Mountains of the Sequoia National Forest. Fishers  
26 are a mammalian species that have been classified as a "sensitive species."

27 SF Keeper maintains, *inter alia*, that the Forest Service has failed to adequately analyze the  
28 impacts of the planned logging practices on the Fisher. SF Keeper argues that Defendants'

1 Supplemental Information Report (“SIR”) dated April 12, 2017 is insufficient and that at a  
2 minimum, Defendants should have prepared a rigorous supplement to the 2013 Environmental  
3 Assessment<sup>1</sup> or prepared an Environmental Impact Statement (“EIS”) due to “significant changes”  
4 since 2013. Defendants maintain, *inter alia*, that the SIR is sufficient and that the Frog Project  
5 would have only minimal, short-term effects on individual Fishers, if any, and will ensure that  
6 habitat in the area can better withstand drought, fires, and insects in the future. This in turn would  
7 benefit the Fishers in the long term by protecting their habitat from potentially extreme destruction  
8 on a vast scale. Defendants, SF Products and SF Keeper have filed cross motions for summary  
9 judgment. For the reasons that follow, Defendants’ and SF Products’ motions for summary  
10 judgment will be granted.

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12 **I. CROSS-MOTIONS FOR SUMMARY JUDGMENT**

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14 **PROCEDURAL BACKGROUND**

15 The complaint commencing this action was filed on June 1, 2016, and sought a declaration  
16 that Defendants had violated NEPA with respect to both the Frog and Rancheria Projects, that the  
17 Forest Service be required to “supplement their NEPA analyses and submit Environmental Impact  
18 Statements for both Projects and that the Forest Service be enjoined from further activity until the  
19 EIS’s are complete. Doc. No. 1. On July 7, 2016, SF Keeper filed a motion for preliminary  
20 injunction, permanent injunction and summary judgment. Doc. No. 8. On July 31, 2016, SF  
21 Keeper filed a notice of withdrawal of its motion for preliminary injunction in light of the Forest  
22 Service’s decision to halt the Projects. Doc. No. 17. The motions for permanent injunction and  
23 partial summary judgment remained. On September 22, 2016, this Court denied SF Keeper’s  
24 motion for partial summary judgment and injunctive relief without prejudice. Doc. No. 24. On  
25 January 5, 2017, this Court granted SF Products’ motion to intervene.

26 On April 20, 2017, Defendants filed a notice of determination to prepare a supplemental  
27 environmental analysis of the Rancheria Forest Restoration Project. Doc. No. 42. Thereafter, on

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<sup>1</sup> An “Environment Assessment” is also sometimes referred to as an “EA.”

1 May 9, 2017, SF Keeper filed a First Amended Complaint dropping the Rancheria Project and  
2 focusing only on the Frog Project. Doc. No. 46. SF Keeper seeks a declaration that Defendants  
3 have violated NEPA and the NFMA, and an order that Defendants must supplement the Frog  
4 NEPA analysis in a supplemental Environmental Assessment or an EIS before they can authorize  
5 any further implementation of the Frog Project. *Id.* The parties then filed cross-motions for  
6 summary judgment, which are now before this Court.

## 7 8 **FACTUAL BACKGROUND**<sup>2</sup>

### 9 ***1. The Fisher and its Habitat***

10 The Fisher is a forest-dwelling mammal in a family that includes weasels, mink,  
11 martens, and otters. They are about the size of a large house-cat and are light brown to dark  
12 blackish-brown. 74 Fed. Reg. 22710, 22714 (April 18, 2016). PSMFO 1.<sup>3</sup> Fisher occurrence is  
13 consistently associated with low- to mid-elevation coniferous and mixed conifer and hardwood  
14 forests with characteristics of late-successional forests (large-diameter trees, coarse downed wood,  
15 and singular features of large snags, tree cavities, or deformed trees). *Id.* PSMFO 2.<sup>4</sup> Fishers are  
16 associated with moderate to dense forest canopy. The most consistent predictor of Fisher  
17 occurrence at large spatial scales was moderate to high amounts of contiguous canopy cover rather  
18 than specific habitat type. Research has suggested that inadequate canopy cover limits Fisher  
19 distribution across forest types and ecoregions. F00282. PSUMF 3. The greatest risk to Fisher  
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22 <sup>2</sup> (1) “PSUMF” refers to Plaintiff’s Statement of Undisputed Material Facts that Defendants agree is undisputed.  
23 “PSMFO” refers to Plaintiff’s Statement of Undisputed Material Facts that Defendants object to.

24 (2) “DSUMF” refers to Defendants’ Statement of Undisputed Material Facts that Plaintiff agrees is undisputed.  
25 “DSMFO” refers to Defendants’ Statement of Undisputed Material Facts that Plaintiff objects to.

26 (3) “DISUMF” refers to Defendant Intervenor’s Statement of Undisputed Material Facts that Plaintiff agrees is  
27 undisputed. “DISMFO” refers to Defendant Intervenor’s Statement of Undisputed Material Facts that Plaintiff objects  
28 to.

<sup>3</sup> Defendants object that the citation for this proffered fact is ambiguous and uncertain, and there is no evidentiary  
support for this proffered fact located at page 22714 of volume 74 of the Federal Register.

<sup>4</sup> Defendants object that the citation for this proffered fact is ambiguous and uncertain, and there is no evidentiary  
support for this proffered fact located at page 22714 of volume 74 of the Federal Register.

1 habitat loss comes from uncharacteristically [severe] wildfires. SF\_16; F\_227. DSUMF 169.<sup>5</sup>

2 **2. Fisher Population Numbers and Sensitive Species Designation**

3 The Southern Sierra Nevada native population of Fishers is small and is geographically  
4 separated from the remainder of the Fishers in the west coast States. 74 Fed. Reg. at 22716.  
5 PSMFO 4.<sup>6</sup> Estimates for the Southern Sierra Nevada population range from a low of 100 to a  
6 high of 500 individuals, with a recent 2016 estimate of 256 female Fishers based on available  
7 habitat, and other estimates from 2011 of 125-250 adult Fishers to fewer than 300 adult Fishers  
8 and 276-359 Fishers, including juveniles and adults. Id. PSMFO 5.<sup>7</sup> Fishers have been listed by  
9 the Forest Service as a sensitive species since 1984. F00270. PSUMF 8.

10 The Forest Service defines “sensitive species” as those plant and animal species identified  
11 by a Regional Forester for which population viability is a concern as evidenced by significant  
12 current or predicted downward trend in numbers or density. SF1508 (Forest Service Manual  
13 2670.5) PSUMF 9. In 2004, the U.S. Fish and Wildlife Service (“US Fish and Wildlife Service”  
14 or “USFWS”) determined that Fishers warranted federal protection under the Endangered Species  
15 Act (“ESA”). 69 Fed. Reg. 18,770 (Apr. 3, 2004), and ten years later proposed a rule to list Fishers  
16 as “threatened” under the ESA. 79 Fed. Reg. 60,419 (Oct. 7, 2014). PSUMF 10. Recently, US  
17 Fish and Wildlife Service withdrew its listing proposal. 81 Fed. Reg. 22,710 (Apr. 18, 2016).  
18 PSUMF 11.

19 **3. Timber Project Geographic Locations**

20 The Frog and Rancheria Project areas are located in Tulare and Kern Counties in the  
21 Greenhorn Mountains of the Sequoia National Forest, just north and south of the community of  
22 Alta Sierra, California. F00033; SF0047 (showing the projects in relationship to other Forest  
23 Service projects in the Greenhorn Mountains). PSUMF 6. The “Core 2” area for Fisher  
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25 <sup>5</sup> Plaintiff: Undisputed that the Silvicultural Review and the 2012 Environmental Assessment makes these assertion  
26 [sic].

27 <sup>6</sup> Defendants object that the citation for this proffered fact is ambiguous and uncertain, and there is no evidentiary  
28 support for this proffered fact located at page 22716 of volume 74 of the Federal Register.

<sup>7</sup> Defendants object that the citation for this proffered fact is ambiguous and uncertain, and there is no evidentiary  
support for this proffered fact located at page 22716 of volume 74 of the Federal Register.

1 conservation, which includes the Greenhorn Mountains, has the highest recorded Fisher  
2 occupancy rates, highest predicted average habitat quality, and highest genetic diversity of Fishers  
3 in the Southern Sierra Nevada Assessment Area. SF0158. PSUMF 7.

4 **4. Proposed Benefits of the Frog Project**

5 When trees grow closely together, they compete for limited water, sunlight, and nutrients,  
6 which causes reduced growth and canopy development. F\_40, 75, 155. DSUMF 61. As initially  
7 proposed, Frog would thin trees on 1,620 acres of the Sequoia National Forest in an area 25 miles  
8 southeast of Porterville, California, and far outside of the Giant Sequoia National Monument. F\_9.  
9 DSMFO 62.<sup>8</sup> The Frog project area contains dense, overcrowded trees characterized by stagnant  
10 growth, low diversity, high potential mortality from insects and drought, and high fire risk. F\_34.  
11 DSMFO 63.<sup>9</sup> The Forest Service has determined that current fuel loads in the project area pose a  
12 high risk of catastrophic loss of property, natural resources, and possibly even life. SF\_21.  
13 DSUMF 167.<sup>10</sup> By implementing Frog, surface fuels would decrease 40 to 80 percent, thereby  
14 limiting the size and severity of wildfires in the project area. SF\_21. DSUMF 168.<sup>11</sup> By thinning  
15 stands in the Frog project area, the Forest Service seeks to promote the growth of healthy, diverse  
16 trees and complex forest structures that would benefit wildlife and withstand insects, drought, and  
17 fires. The Forest Service also seeks to remove hazard trees that pose a risk to public safety along  
18 roads, trails, and other improvements in the area. F\_39–40. DSUMF 64.

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22 <sup>8</sup> It is undisputed that the original acreage was 1,620 acres and the rough location of the Frog Project is 25 miles  
23 southeast of Porterville, California. However, Plaintiff objects that the remaining statement misstates evidence and  
24 asserts that the Frog project is not “far outside the Giant Sequoia National Monument.” Instead, “[t]he Frog Project  
Area is directly east of, and adjacent to, the designated boundary of the Monument (See Appendix A, Map 1).” F\_35;  
see also F\_248 (map).

25 <sup>9</sup> Plaintiff: Objection. Misstates evidence. There are no statements of “stagnant growth” or “low diversity” at the cited  
26 page. Instead, “Forest Service professionals, familiar with the area, observed declining forest stand health and  
expressed concern about high forest stand densities, low stand growth, continued large tree mortality due to insect  
27 attack and periodic drought, and the high risk of wildfire.” F0034.

28 <sup>10</sup> Plaintiff: Undisputed that the Revised Fisher BE makes that assertion.

<sup>11</sup> Plaintiff: Undisputed that the Revised Fisher BE makes that assertion.

1       **5. Initial Approval of the Frog Project by the Forest Service**

2           Pursuant to NEPA, 42 U.S.C. § 4332, the Forest Service analyzed Frog in an  
3 Environmental Assessment, responded to public comments, and approved the project in 2001 with  
4 a Finding of No Significant Impact (“FONSI”). F\_9, 45. DSUMF 65. The Forest Service issued  
5 its original decision to proceed with the Frog Project on February 5, 2001, supported by the 2000  
6 Frog Environmental Assessment. F02402. PSUMF 13. The McNally Fire burned across 150,000  
7 acres, including portions of the project area. Frog was thus modified to include salvage harvest on  
8 190 acres of fire-damaged trees. In addition, because the McNally Fire changed the distribution of  
9 spotted owl, 180 acres of Frog were set aside as a spotted owl Protected Activity Center. F\_9–10,  
10 F\_35–36. DSUMF 66. Salvage harvest operations on Frog were completed in 2003. F\_10.  
11 DSUMF 67.

12       **6. Overview of Sierra Forest Products’ Logging Work on the Frog Project**

13           [Intervenor-Defendant] SF Products holds the Frog Thinning Timber Sale contract, which  
14 was originally executed in 2001. First Decl. of Larry Duysen ¶ 19 (Dkt. 12. First Duysen Decl.).  
15 SF Products was awarded the Frog Thinning contract in October 2001, shortly after initial project  
16 development. First Duysen Decl. ¶ 23. DISUMF 1. SF Products began implementing the contract,  
17 harvesting on 190 acres by 2003. First Duysen Decl. ¶ 19.

18           One hundred ninety acres were logged after a fire, which left 1,260 acres available in  
19 timber sale units (F00079), including 855 acres of Fisher habitat. F00315. The Frog Timber Sale  
20 contract, held by [SF Products], includes 780 acres, some of which have already been logged.  
21 SF1549; see also SF1553 (map, showing and listing 603 cut and 177 un-cut acres, including 66  
22 acres of uncut Fisher habitat). Much of the Frog Project has not been cut, advertised, or sold. Id.  
23 (see units labeled as “Frog II”). PSUMF 18. The Revisions 1.

24           Work stopped in October 2006 due to an injunction. Id. DISUMF 2. SF Products resumed  
25 operations in 2015. Second Duysen Decl. ¶ 4. As of the end of the 2015 operating season, SF  
26 Products had completed over 83% of the harvest and only 157 acres remain to be harvested. Id.  
27  
28

1 DISUMF 3.<sup>12</sup> SF Products intends to resume the Frog Thinning work [in late September 2017]<sup>13</sup>,  
2 when restrictions relating to Fisher are lifted. Second Duysen Decl. ¶ 4. SF Products plans to  
3 employ about eight loggers to conduct the harvest, along with three to four truck drivers, and will  
4 use the material to keep its 120 mill workers on the job. *Id.* ¶ 7. DISMFO 5.<sup>14</sup> In addition to the  
5 Frog Thinning contract, another contract, “Frog II,” will be sold to implement the Frog Project.  
6 Second Duysen Decl. ¶ 8. SF Products expects to bid on Frog II and is the likely purchaser of the  
7 second sale on the project. *Id.* ¶¶ 8, 23. DISMFO 6.<sup>15</sup> SF Products’s wood supply is highly  
8 tenuous. Second Duysen Decl. ¶ 10. A halt to the project that could result from vacatur threatens  
9 the ability of the mill to keep operating at current levels and could result in layoffs or payroll  
10 reductions. *Id.* The mill is important to the economy of Tulare County. First Duysen Decl. ¶ 7.  
11 DISMFO 7.<sup>16</sup>

### 12 **7. *Litigation Regarding the Fisher***

13 On January 27, 2005, a group of Plaintiffs, including SF Keeper, filed suit against various  
14 projects that eventually included the Frog Project. See Sierra Club v. Bosworth, 465 F. Supp. 2d  
15 931, 935 (Aug. 25, 2006). PSUMF 14. In 2006, the U.S. District Court for the Northern District  
16 of California enjoined further activity on the Frog project. Of particular concern was a finding by  
17 the Fish and Wildlife Service that the Fisher may meet the criteria for listing under the Endangered  
18 Species Act. F\_10; Sierra Club v. Bosworth, N.D. Cal. Case No. 05-397 CRB, ECF No. 210, at  
19 13. DSUMF 68. Several conservation groups concerned with Fisher protection have filed suit to  
20 challenge the US Fish and Wildlife Service’s decision not to list the Fisher as a threatened or  
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22 <sup>12</sup> Plaintiff: Undisputed, except that the Forest Service reports that “177 acres of treatment remain” in the existing sale. SF0063.

23 <sup>13</sup> SF Products initially intended to resume work in August 2017.

24 <sup>14</sup> Plaintiff has no way to dispute or object to what SF Products plans to do in the future or how it intends to  
25 implement its contract or otherwise conduct the activities at its mill.

26 <sup>15</sup> Plaintiff: Undisputed that the Forest Service is likely to sell another contract to implement the Frog Project in the  
27 future. Otherwise, Plaintiff has no way to dispute or object to what SF Products plans to do in the future or whether it  
28 will be the likely purchaser of the Frog II contract, which is speculative.

<sup>16</sup> Plaintiff has no way to dispute or object to the status of SF Product’s wood supply, potential operational or  
employment issues, or the mill’s importance to the economy (which is vague and speculative), and submits that these  
statements constitute extra-record evidence not included in the Administrative Record.

1 endangered species. That decision has been challenged in Federal court. See Center for Biological  
2 Diversity v. U.S. Fish and Wildlife Service, No. 3:16-cv-06040 (N.D. Cal., Oct. 19, 2016)  
3 (Complaint). PSUMF 12.

4 On August 25, 2006, Judge Breyer of United States District Court for the Northern District  
5 of California issued an order that permanently enjoined the several timber sale projects in that  
6 case, which included the Frog Project, the adjacent Ice Tractor, Ice Helicopter, Saddle, and White  
7 River projects, “until a satisfactory supplemental NEPA review has been conducted concerning  
8 the recent and significant new information on the Pacific Fisher.” Sierra Club, 465 F. Supp. 2d at  
9 942. PSUMF 15.

#### 10 **8. 2012 Biological Evaluation**

11 The Forest Service convened an interdisciplinary team to complete an extensive review of  
12 scientific studies and literature and assess potential effects of Frog on the Fisher, culminating in a  
13 2012 Biological Evaluation that spanned 100 pages. F\_254–58. DSMFO 69.<sup>17</sup> The analysis in  
14 Frog’s 2012 Fisher Biological Evaluation was incorporated into a revised Environmental  
15 Assessment and several project design features to minimize impacts on Fisher. SF\_17; F\_219,  
16 262, 274, 295–96, 304, 309, 336, 623. DSUMF 70. According to Frog’s 2012 Biological  
17 Evaluation for the Fisher, the baseline vegetation for areas outside of the Frog project units—  
18 including most areas in the seventh order watersheds overlapping the Frog project—used an  
19 Existing Vegetation (or “EVEG”) layer from 2001 to 2003. F\_269, 297, 330; Cordes ¶ 24 & n.5.<sup>18</sup>  
20 DSMFO 128.<sup>19</sup>

21 The Forest Service issued a Finding of No Significant Impact in 2013 after finding that

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22 <sup>17</sup> Plaintiff objects that the phrase “extensive review” is vague and ambiguous.

23 <sup>18</sup> To the extent that any facts solely rely on the Cordes declaration, the Court will ignore such facts since as stated  
24 below, Defendants’ motion in the alternative to admit the Cordes declaration is denied as moot.

25 <sup>19</sup> Plaintiff: Objection. Misstates evidence. There is no mention of EVEG in the original Frog Project documents,  
26 likely because EVEG did not exist in 2001 to 2003. “Brief History of the Existing Vegetation Technical Guide,”  
27 provided on the Forest Service’s website at the bottom of the page at  
28 <https://www.fs.fed.us/emc/rig/protocols/vegclassmapinv.shtml> (last visited June 5, 2017) (indicating that the original  
EVEG guide, vers. 1.0 was published in 2005). Instead, the Frog Project documents refer to CWHR and CWHR 2.1  
habitat information. See F\_269, 297, 330. This proffered fact relies on the Cordes Declaration, which makes the same  
incorrect assertions, but the Court may not rely on the post hoc declaration of Jeff Cordes, which is not in the record.  
See Citizens to Preserve Overton Park, 401 U.S. at 419.



1 Frog would not result in a loss of viability or contribute to factors that lead to federal protection of  
2 the Fisher under the Endangered Species Act (“ESA”) and involved only a light to moderate  
3 change in Fisher habitat on a small proportion of available habitat. F\_5, 45. DSUMF 76.<sup>20</sup> The  
4 Forest Service also found that Frog provided long-term benefits to the Fisher by reducing the risk  
5 of severe wildfires, which could permanently destroy Fisher habitat, and by promoting the growth  
6 and re-growth of understory vegetation and increasing available rest sites, tree size, and layered  
7 groups of trees. F\_5–6, 337. DSUMF 77.<sup>21</sup>

8 **9. 2013 Lift of the Injunction on the Frog Project**

9 In response to the court’s order, on May 14, 2013, the Forest Service issued a letter and  
10 four documents, which are relevant to the issues in this case: (1) A letter affirming the February 5,  
11 2001, Decision Notice for the Frog Project Area Analysis Environmental Assessment (F00001);  
12 (2) An updated Finding of No Significant Impact for Revision 1 (SF00009); (3) Revision 1 to the  
13 Environmental Assessment for the 2000 Frog Project Area Analysis (F00024); and (4) A  
14 Supplemental Biological Evaluation (BE) for Fisher & Maps – Appendix A to Rev. 1 of the  
15 Environmental Assessment (F00251). PSUMF 16.

16 Shortly thereafter, on May 17, 2013, the Forest Service asked Judge Breyer to lift the  
17 injunction; and in response, on May 31, 2013, the plaintiffs filed a “Statement of Non-Opposition  
18 to Defendants’ Motion for Relief from Judgment,” in which they included the following  
19 statement:

20 While this may respond to the narrow scope of Plaintiffs’ procedural claim  
21 regarding significant new information, concerns remain about the substantive  
22 impacts of the Frog Project to Pacific Fishers, and the ongoing threats to the  
23 population viability of this rare species as a result of U.S. Forest Service  
24 commercial logging projects that unnecessarily remove mature trees and  
substantially reduce forest canopy cover in occupied Pacific Fisher areas.  
Plaintiffs are also concerned about apparent inaccuracies in the fire effects  
analysis in the revised Frog Project [Environmental Assessment], specifically,

25 <sup>20</sup> Plaintiff: Undisputed that the FONSI included this finding, although the issues of Fisher viability and the need for  
26 ESA protection remain highly controversial among scientists. 81 Fed. Reg. 22710, 22734 & 22739 (April 18, 2016)  
(considering climate change and the Fisher’s small population size).

27 <sup>21</sup> Plaintiff: Undisputed that the FONSI included this finding, although as Plaintiffs expressed in their statement in  
28 response to Defendant’s motion to lift the injunction against the Frog Project, “Plaintiffs are also concerned about  
apparent inaccuracies in the fire effects analysis in the revised Frog Project EA, specifically, the EA’s substantial  
overstatement of expected tree mortality in a wildland fire under current stand conditions.” SF1545.

1 the [Environmental Assessment's] substantial overstatement of expected tree  
2 mortality in a wildland fire under current stand conditions. Plaintiffs will continue  
3 to review the record and other supporting documentation for the Frog Project, and  
any other future projects, and hereby reserve the right to file an amended complaint  
challenging Defendants' decision to affirm the 2001 Frog Project Decision Notice  
and Finding of No Significant Impact.

4 SF1545. PSUMF 17. The 2006 injunction on Frog was lifted on July 13, 2013. Sierra Club v.  
5 Bosworth, N.D. Cal. Case No. 05-397 CRB, ECF Nos. 251, 253. DSUMF 78.

6 ***10. SF Keeper's 2014-2016 Correspondence with the Forest Supervisor***

7 On March 27, 2014, SF Keeper and others sent a letter to Sequoia National Forest  
8 Supervisor Kevin Elliott asking the Forest Service to re-analyze the Frog, Rancheria, and other  
9 projects based on three new studies not cited in each projects' respective NEPA analyses. SF1371.  
10 PSUMF 45. In a letter dated May 14, 2014, Forest Supervisor Kevin Elliott responded, and stated  
11 that "I conclude that a revision to our environmental documents for the current and past projects  
12 listed in your letter is not necessary." SF1360. PSUMF 46. On January 11, 2016, SF Keeper and  
13 others sent a second letter to Forest Supervisor Kevin Elliott, requesting that the Forest Service re-  
14 analyze the Frog and Rancheria Projects and supplement their NEPA analyses based on new  
15 scientific information not cited in the projects' respective NEPA analyses. SF1341. PSMFO 47.<sup>22</sup>  
16 In a letter, dated January 22, 2016, Forest Supervisor Kevin Elliott acknowledges receipt of the  
17 January 11, 2016 letter, stating that "I may not get a response to you by the end of February, but I  
18 will get a response to you." SF1359. PSUMF 48.

19 ***11. The Fish and Wildlife Service Withdrew Its Request to List Fishers as a Threatened***  
20 ***Species in April 2016***

21 The Fish and Wildlife Service withdrew its proposal to list the Fisher as a threatened  
22 species after receiving further data from peer reviewers and the public and completing further  
23 analysis. 81 Fed. Reg. 22,710, 22,721 (Apr. 18, 2016). DSUMF 80.<sup>23</sup> The Fish and Wildlife  
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25 <sup>22</sup> Defendants concede it is undisputed that SF Keeper sent a letter to Forest Supervisor Kevin Elliott on January 11,  
26 2016, containing the foregoing claims and contentions.

27 <sup>23</sup> Plaintiff: Undisputed, that the USFWS withdrew its proposal to list the Fisher; however, the need for ESA  
28 protection remains highly controversial among scientists. 81 Fed. Reg. 22710, 22734 & 22739 (April 18, 2016)  
(considering climate change and the Fisher's small population size). Moreover, the USFWS' decision not to list the  
Fisher has been challenged in Center for Biological Diversity v. USFWS, No. 3:16-cv-06040 (N.D. Cal., Oct. 19,  
2016) (Complaint).

1 Service found no “indication that Fishers or their habitat in the west coast States are responding  
2 negatively to the stressors to which they are exposed to a significant degree at either the  
3 population or rangewide scales, nor are they likely to do so in the foreseeable future.” 81 Fed.  
4 Reg. 22,710, 22,710 (Apr. 18, 2016). DSUMF 81.<sup>24</sup> The Fish and Wildlife Service found that,  
5 while individual Fishers might possibly be affected to some degree by thinning and other forest-  
6 management efforts, there is no evidence such activities “are causing Fisher to decline across its  
7 range currently, or that suggests an expected decline across its range in the future.” 81 Fed. Reg.  
8 22,710, 22,721 (Apr. 18, 2016). DSUMF 82.<sup>25</sup>

9 ***12. SF Keeper’s Suit to Compel Supplemental NEPA Review of the Frog Project and***  
10 ***Suspension of Frog by the Forest Service***

11 On June 1, 2016, SF Keeper sued the Forest Service to compel supplemental NEPA review  
12 of the Frog project based on two Fisher studies and recent tree mortality. One month later, SF  
13 Keeper moved for partial summary judgment and a permanent injunction. Dkt. # 8.<sup>26</sup> PSUMF 20.  
14 Shortly thereafter, the Forest Service elected to suspend Frog to collect and analyze updated tree-  
15 mortality information. ECF Nos. 1, 8, 17 & 18 at 6–7. DSUMF 83.

16 ***13. Tree Mortality***

17 In July of 2016, the Forest Service acknowledged the massive die-off of trees resulting  
18 from the drought in the Southern Sierras, reporting that 66 million trees had succumbed as a result.  
19 SF0093. PSUMF 31. “On the Sequoia National Forest, an estimated 7.2 million conifer trees died  
20 over an area of 224,000 acres in the period between October 2015 and May 2016 alone.” SF0063.

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22 <sup>24</sup> Plaintiff: Undisputed that the USFWS issued this finding; however, this issue is in dispute because it contradicts the  
23 USFWS’s earlier finding “that the main threats to the West Coast DPS of Fisher are habitat loss from wildfire and  
24 vegetation management; toxicants (including anticoagulant rodenticides); and the cumulative and synergistic effects  
25 of these and other stressors acting on small populations” and “that several combinations of cumulative and synergistic  
26 stressors rose to the level of a threat in most Fisher populations ...” 79 Fed. Reg. 60,419, 60,420 & 60,434 (Oct. 7,  
27 2014).

28 <sup>25</sup> Plaintiff: Undisputed that the USFWS issued this finding; however, it also “found that vegetation management is a  
threat because activities that remove or substantially degrade Fisher habitat through the removal of large structures  
and overstory canopy are projected to take place within the analysis area over the next 40 years.” 79 Fed. Reg. at  
60,430.

<sup>26</sup> Plaintiff maintains that it filed for a preliminary injunction to “avert imminent harm from logging, which was  
scheduled to restart on August 1, 2016.” PSUMF 20.

1 PSUMF 32. “This historic tree mortality is creating rapidly changing landscape conditions on the  
2 Sequoia National Forest, and updated data on existing vegetation in the area is needed to fully  
3 understand the impacts the die-off is having on Fisher habitat.” SF0063. PSUMF 33.<sup>27</sup> In August  
4 of 2016, the human-caused Cedar Fire began and eventually burned across more than 29,000 acres  
5 of the Greenhorn Mountains just south of the Frog Project. See SF0010, SF0047 (map). PSUMF  
6 34. The Cedar Fire burned to the south of the seventh order watersheds overlapping the Frog  
7 project. SF\_43, 47. DSUMF 127. In November of 2016, the Forest Service reported that an  
8 additional 36 million trees had died since May of 2016, for a total of over 102 million, with most  
9 located the southern and central Sierra Nevada region. SF1287. PSMFO 35.<sup>28</sup>

10 “Trees will continue to die throughout California despite the winter 2016/2017  
11 precipitation. Typically, it takes one to three years after an above-normal precipitation year before  
12 trees regain their natural defenses against bark beetles.” SF0048. PSUMF 36.<sup>29</sup> Forest Service  
13 “scientists expect to see continued elevated levels of tree mortality during 2017 in dense forest  
14 stands, stands impacted by root diseases or other stress agents and in areas with higher levels of  
15 bark beetle activity.” SF1287. PSUMF 37.<sup>30</sup> Further, a NASA study found that “Tree mortality  
16 was higher than expected for large diameter trees, suggesting an acceleration of old-tree  
17 mortality...” SF1576. PSMFO 38.<sup>31</sup> A recent Forest Service map provides a dramatic illustration  
18 of the progression of tree mortality in the Southern Sierra Nevada from 2014 to 2016. SF1580.  
19 PSUMF 39. Frog’s Environmental Assessment states that the latest forest stand data for the Frog  
20 Project area was collected in 2010. F00062. PSUMF 19.

21 \_\_\_\_\_  
22 <sup>27</sup> Defendants: Undisputed that the cited document contains this statement.

23 <sup>28</sup> Defendants object that this misstates evidence and claim that this cited press release states that the Forest Service  
24 identified an additional 36 million dead trees across California since its last aerial survey in May 2016, for a total of  
25 102 million dead trees identified since 2010.

26 <sup>29</sup> Defendants: Undisputed that the cited document contains this statement.

27 <sup>30</sup> Defendants: Undisputed that the cited document contains this statement.

28 <sup>31</sup> Defendants object that this misstates evidence and claim that “Tree mortality was higher than expected for large  
diameter trees, suggesting an acceleration of old-tree mortality” was not a finding of the NASA study concerning the  
current wave of tree mortality; it was an observation from a study published over a decade ago in Smith TF, Rizzo  
DM, North M (2005) Patterns of mortality in an old-growth mixed- conifer forest of the southern Sierra Nevada,  
California. FOREST SCIENCE 51: 266-275. (SF1576, SF1577.)

1 “[T]ree mortality has not been uniform across the Sierra Nevada.” SF\_1328. DSMFO  
2 85.<sup>32</sup> “A great deal of scientific literature and professional expertise indicates that active forest  
3 management . . . is necessary to minimize the extent of drought- and beetle-induced tree mortality  
4 and also to mitigate the adverse impacts from mortality that [have] already occurred.” SF\_1329.  
5 DSMFO 86.<sup>33</sup> “Given the serious risks associated with inaction and lack of forest management,  
6 [the Forest Service] must simultaneously study and manage the land. SF\_1329. DSMFO 87.<sup>34</sup>

7 In August 2016, SF Keeper sent letters to Forest Supervisors in the Sierra Nevada asserting  
8 that recent tree mortality required halting numerous forest-management projects and withdrawing  
9 their supporting NEPA documents. The Regional Forester for the Pacific Southwest Region  
10 responded on August 30, 2016, stating that SF Keeper’s “sweeping and drastic” request was not  
11 appropriate as a matter of law or policy. SF\_1331, 1329. DSUMF 84.

12 ***14. Forest Service Collected Images in Mid-2016 Which Show Habitat Relevant to Fishers***

13 To assess Frog in light of recent tree mortality, the Forest Service collected high resolution  
14 aerial images of the Sequoia National Forest in mid-July 2016. Using this data, the Forest Service  
15 updated the agency’s geographic-information-system map of vegetation (termed “Existing  
16 Vegetation”, or “EVEG”), which, among other things, shows California Wildlife Habitat  
17 Relationship Program (“CWHR”) habitat. SF\_11, 19, 47a (ECF No. 41-4); Cordes Decl. ¶¶ 8–9.  
18 DSMFO 90.<sup>35</sup> CWHR includes detailed information about habitat components important to Fisher,  
19 such as tree species, size, and canopy density. SF\_47a (ECF No. 41-4), F\_274; Cordes Decl. ¶ 9.  
20 DSMFO 91.<sup>36</sup> The complex and labor-intensive process of converting the July 2016 images into  
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22 <sup>32</sup> Plaintiff: Undisputed that this is what the Regional Forester asserted in his letter to Plaintiff, although this statement  
23 is not supported by data and is more an opinion than a fact.

24 <sup>33</sup> Plaintiff: Undisputed that this is what the Regional Forester asserted in his letter to Plaintiff, although this statement  
25 is not supported by data and is more an opinion than a fact.

26 <sup>34</sup> Plaintiff: Undisputed that this is what the Regional Forester asserted in his letter to Plaintiff, although this statement  
27 is not supported by data and is more an opinion than a fact.

28 <sup>35</sup> Plaintiff: “Undisputed that these documents make these assertions, except that the Court may not rely on the *post hoc*  
29 declaration of Jeff Cordes, which is not in the record.

<sup>36</sup> Plaintiff: “Undisputed that these documents make these assertions, except that the Court may not rely on the *post hoc*  
30 declaration of Jeff Cordes, which is not in the record.”

1 EVEG took several months. ECF No. 29, at 2; SF\_1298; Cordes Decl. ¶¶ 8, 16 & n.4; U.S. Forest  
2 Serv., Existing Vegetation Classification, Mapping and Inventory Technical Guide Version 2.0, at  
3 3-13 (June 2015) (detailing the EVEG creation process), available at  
4 [https://www.fs.fed.us/emc/rig/documents/protocols/vegClassMapInv/EVTG\\_v2-0\\_June2015.pdf](https://www.fs.fed.us/emc/rig/documents/protocols/vegClassMapInv/EVTG_v2-0_June2015.pdf).  
5 (last visited May 26, 2017). DSMFO 92.<sup>37</sup>

6 Aerial Detection Surveys tally the number of dead trees observed during flights over  
7 millions of acres across the entire state of California. SF\_1287; Cordes Decl. ¶¶ 16–17; U.S.  
8 Forest Serv., Aerial Detection Survey Methodology, [https://www.fs.usda.gov/detail/r5/forest-](https://www.fs.usda.gov/detail/r5/forest-grasslandhealth/?cid=stelprdb5429568)  
9 [grasslandhealth/?cid=stelprdb5429568](https://www.fs.usda.gov/detail/r5/forest-grasslandhealth/?cid=stelprdb5429568) (last visited May 26, 2017). DSMFO 129.<sup>38</sup> Aerial  
10 Detection Surveys occurred in different regions across California from May to September 2016.  
11 Cordes Decl. ¶¶ 11–15 & Ex. 2–3; U.S. Forest Serv., Aerial Survey 2016, at 2, available at  
12 [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd539536.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd539536.pdf) (last visited May 26,  
13 2017). DSMFO 130.<sup>39</sup> The Forest Service used satellite imagery to confirm that any difference in  
14 vegetation in the project area between July and October 2016 was *de minimis*. SF\_47a (ECF No.  
15 41-4); Cordes Decl. ¶ 8. DSMFO 131.<sup>40</sup>

### 16 ***15. SF Keeper’s Motions Denied in September 2016***

17 This Court denied SF Keeper’s motions for partial summary judgment and a permanent  
18 injunction without prejudice on September 21, 2016, finding that SF Keeper “ha[d] not  
19 demonstrated either success on the merits or a substantial likelihood of success on the merits under  
20 the facts of the case as they now stand.” This Court also held that the Forest Service already gave  
21 adequate consideration to the study authored by James D. Garner, Selection of Distributed Habitat  
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23 <sup>37</sup> Plaintiff: “Undisputed that these documents make these assertions, except that the Court may not rely on the *post*  
24 *hoc* declaration of Jeff Cordes, which is not in the record.”

25 <sup>38</sup> Plaintiff: Undisputed, except that the Court may not rely on the post hoc declaration of Jeff Cordes, which is not in  
the record.”

26 <sup>39</sup> Plaintiff: Objection, the Court may not rely on the post hoc declaration of Jeff Cordes, which is not in the record.

27 <sup>40</sup> Plaintiff: Objection. Misstates evidence. The cited reference never states that the difference between July and  
28 October 2016 was “de minimis.” Instead, the assertion is that the “change of less than 1 percent due to mortality,”  
which Plaintiff disputes. Moreover, the Court may not rely on the post hoc declaration of Jeff Cordes, which is not in  
the record.

1 by Fishers (*Martes Pennanti*) in the Sierra National Forest (master’s thesis, May 2013). ECF No.  
2 24, at 14–16. DSUMF 88. In denying SF Keeper’s motions, this Court further noted that “the sort  
3 of controversy that appears to underlie this action—a controversy typified by differences in  
4 opinion on the values of mutually recognized long and short term goals and risks—is not proper  
5 subject matter for determination by a district court in an action under NEPA.” ECF No. 24, at 16.  
6 DSUMF 89.<sup>41</sup>

7 ***16. Conservation Biology Institute Analysis in Late 2016-Early 2017***

8 In December of 2016, the Forest Service told the parties and this Court that it had  
9 completed its collection and processing of tree-mortality data and transmitted the data to its  
10 contractor for analysis. Suppl. JSR at 4 (Dkt # 29). PSUMF 40. The Forest Service contracted  
11 with its Fisher experts, the Conservation Biology Institute (“CBI”), to further analyze and process  
12 the data to determine current Fisher habitat suitability levels and distribution in the Sequoia  
13 National Forest, with an anticipated completion date of January 31, 2017. *Id.* PSUMF 41. In  
14 December 2016, the Forest Service provided the new EVEG layer to CBI to update a separate map  
15 of the southern Sierra Nevada (termed a “management grid”) published in the 2016 Fisher  
16 Strategy. SF\_1298. DSUMF 93. The Fisher Strategy’s management grid system divides the  
17 landscape into a grid of hexagons, each of which covers 2,560 acres and is classified as suitable  
18 (green), potentially suitable (yellow), or unsuitable (red). SF\_171, 176. DSUMF 94. In the Fisher  
19 Strategy’s management grid system, describing a hexagon as “suitable” merely reflects a  
20 “statistical characterization” as to whether the area within the hexagon is “representative of areas  
21 used . . . by breeding females.” It is a “proxy . . . at coarse, landscape scales” and “is not accurate  
22 at fine scales.” SF\_7, 174 n.12. DSUMF 95.

23 On February 27, 2017, and in a subsequent March 1, 2017, addendum, SF Keeper submitted  
24 an additional letter to the Forest Service, which requested a response to additional new  
25 circumstances and information. SF1278 & SF1265. PSUMF 49.

26 After CBI ran the Forest Service’s updated EVEG information through its model for the

27 \_\_\_\_\_  
28 <sup>41</sup> Plaintiff: Undisputed that the Court made this statement, except that it also stated that “the court cannot be certain  
that Forest Service’s promised consideration of the significance of new information on current plans for the Frog and  
Rancheria projects will not give rise to a meritorious claim for injunctive relief.” *Id.*

1 management grid system, draft results showed many green hexagons were now yellow. SF\_1294–  
2 95. DSUMF 96. After CBI ran the Forest Service’s updated EVEG information through its model  
3 for the management grid system, CBI suggested that the model’s definition of “suitability” may be  
4 too narrow, and further concluded that its method for classifying hexagons needed further  
5 refinement to account for data from different time periods. CBI thus advised against using  
6 hexagon-suitability classes or numerical targets for green hexagons in the analysis of forest-  
7 management projects. SF\_1288, 1298, 55. DSMFO 97.<sup>42</sup>

8 In March 2017, CBI issued interim guidance for applying the Fisher Strategy’s principles,  
9 goals, and objectives to forest-management projects. SF\_54. DSUMF 98. CBI completed its  
10 analysis and determined that 92.5% (49/53) of suitable hexagons, each representing the size of an  
11 average female Fisher territory, had become unsuitable as Fisher habitat. SF1292. PSMFO 42.<sup>43</sup>  
12 But CBI also found significant problems with the datasets it used for its Fisher habitat suitability  
13 model, and cautioned that the results should not be applied until vegetation data could be updated.  
14 SF1298. PSUMF 43.<sup>44</sup> CBI also cautioned: “how Fishers are actually responding to these recent  
15 changes in forest structure is currently unknown, as field data from Fishers using such a post-  
16 mortality landscape are as of yet unavailable.” Id. PSUMF 44.

17 In CBI’s March 2017 guidance, CBI advised that, notwithstanding ongoing research and  
18 the reality that updated vegetation data inevitably lags project analysis, “increasing the resilience  
19 of the remaining patches of large living conifers will be important for the long-term persistence of  
20

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21 <sup>42</sup> Plaintiff: Objection. Misstates evidence. CBI does not suggest that the model’s definition of suitability “may be too  
22 narrow” and does not advise against using the model only for “green hexagons.” Instead, CBI stated that “data  
23 limitations make the **draft results highly uncertain; and we do not advise applying them** until vegetation layers are  
24 more comprehensively updated, and a more refined and justified analysis can be performed.” SF1298 (bold in  
25 original). Moreover, “[r]esults suggest that tree mortality has greatly reduced the amount of suitable habitat on  
Sequoia NF, but **this result should be interpreted with great caution.**” Id. “**Until these issues are rectified, we do  
not recommend applying the original management grid system to evaluate the changes to unsuitable,  
potentially suitable, and suitable cells at this time. We also do not recommend applying the conservation  
targets, nor the Strategy description of target cells, at this time.**” SF0055 (bold in original).

26 <sup>43</sup> Defendants object that this misstates evidence and claim that the draft results using CBI’s model indicated that 92.5  
27 percent (49 of 53) of green (suitable) hexagons were now yellow (potentially suitable). See SF0176, SF1295, SF1292.

28 <sup>44</sup> Defendants concede it is undisputed that CBI advised against using its draft update of the suitability grid.  
Defendants object that this misstates evidence and claim that CBI did not find problems in the datasets. Rather, CBI  
questioned whether its modeling algorithm could properly interpolate datasets from different time periods.



1 the Fisher population.” SF\_54, 56. DSMFO 99.<sup>45</sup> CBI’s March 2017 guidance outlined an  
 2 approach for evaluating whether projects are likely to enhance forest health while avoiding  
 3 adverse impacts to Fishers. SF\_57. DSMFO 100.<sup>46</sup> CBI’s March 2017 guidance also outlined an  
 4 approach for evaluating projects on three spatial scales—the project (stand) scale, the Fisher home  
 5 range (hexagon) scale, and the Fisher population (Core) scale. SF\_57–59. DSUMF 101. In  
 6 CBI’s parlance, a “hexagon” or “cell” or “home range” is the approximate size of a female Fisher  
 7 breeding territory, which is about 4 square miles or 2,560 acres. SF\_171. DSUMF 102. The  
 8 “seventh order watershed” scale is roughly equivalent to the size of a Fisher home range or  
 9 hexagon. SF\_9, 27. DSMFO 103.<sup>47</sup>

10 In CBI’s parlance, a “Core” is a contiguous area of Fisher habitat in which Fishers can  
 11 establish home ranges and coningle as a population. SF\_144. DSUMF 104. Frog is located in  
 12 “Core Area 2,” which covers 213,321 acres. SF\_31. DSMFO 105.<sup>48</sup> CBI’s March 2017 guidance  
 13 outlined an approach for evaluating projects that considered potential impacts to “moderate and  
 14 high-capability CWHR 2.1 habitat,” as well as “high-value reproductive habitat.” SF\_57–59.  
 15 DSMFO 106.<sup>49</sup> High-value reproductive habitat (or “CBI habitat”) is largely a subset of CWHR  
 16 2.1 related to areas used by breeding female Fishers. SF\_56–57, 182, 193, 247, 47a (ECF No. 41-

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17 <sup>45</sup> Plaintiff: Objection. Misstates evidence. CBI did not “advise” this, but instead stated that “it is probable that  
 18 maintaining, and increasing the resilience of the remaining patches of large living conifers will be important to  
 19 providing for the long-term persistence of the Fisher population.” SF0054. Moreover, while “the authors recognize the  
 20 need to improve the resiliency of stands impacted by tree mortality and to mitigate the hazards posed by dead trees,”  
 they cautioned that “it is likely that [Fishers] are experiencing elevated stress due to habitat change and may be less  
 tolerant of disruption than previously documented.” SF0056-57.

21 <sup>46</sup> Plaintiff: Objection. Misstates evidence. While the authors “describe an interim process for designing and  
 22 evaluating vegetation management projects,” they do not state that these designs or evaluations will result in  
 “avoiding adverse impacts to Fishers.” SF0057.

23 <sup>47</sup> Plaintiff: Objection. Misstates evidence. Those statements do not assert that a 7th order watershed is “roughly  
 24 equivalent” in size to a Fisher home range. Instead, the Forest Service uses its 7th order watershed scheme as a  
 substitute for a female home range area (SF0009 & 27), even though the average 7th order watershed area in the Frog  
 Project area is “approximately 3,697 acres” or 44% larger than the CBI hexagon of 2,560 acres ( $3,697/2,560=1.44$ ).  
 Id.

25 <sup>48</sup> Plaintiff: Undisputed, except this is only the portion within the forest boundary and this includes only “109,919  
 26 acres of suitable CWHR 2.1 habitat and 71,662 acres of high value reproductive habitat as defined by CBI.” Id.

27 <sup>49</sup> Plaintiff: Undisputed, except that the “approach” suggested evaluation of at least the following: canopy cover;  
 28 large trees and snags; hardwood basal area and total basal area; remaining CWHR high reproductive value habitat  
 pockets/refugia; connectivity between pockets of high value reproductive habitat, as indicated by presence of other  
 moderate and high capability habitat as defined by CWHR 2.1 (SF0057-58)

1 4). DSUMF 107. CBI's March 2017 guidance outlined an approach for evaluating projects that  
2 considered ground disturbance in affected hexagons using recommended Fisher-tolerance  
3 thresholds adapted from William J. Zielinski et al., An assessment of Fisher (*Pekania pennanti*)  
4 tolerance to forest management intensity on the landscape, 310 FOREST ECOL. & MGMT 821  
5 (Oct. 10, 2013). SF\_59, 56. DSUMF 108.

6 ***17. Forest Service's 2017 Announcement of Delaying the Forest Plan Revisions***

7 On March 20, 2017, the Forest Service announced that it would delay the schedule of  
8 Forest Plan Revisions for the Sequoia and Sierra National Forest to "consider changed vegetation  
9 conditions" related to the extraordinary die-off of trees in the Southern Sierras and issue a new  
10 supplemental Draft Environmental Impact Statement in early 2018. 2nd Voss Dec., Exhibit A.  
11 PSUMF 50.

12 ***18. Southern Sierra Fisher Conservation Strategy's March 2017 Amendment***

13 On or about March 28, 2017, the authors of the Southern Sierra Fisher Conservation  
14 Strategy (also known as the Fisher Technical Team) issued an interim amendment to the Fisher  
15 Conservation Strategy, titled Changed Circumstances and Implementation of the Southern Sierra  
16 Nevada Fisher Conservation Strategy Note from the Authors, March 2017. SF0054. PSMFO 51.<sup>50</sup>  
17 The amendment addresses application of the conservation strategy to project implementation,  
18 considering the substantial changes to structural components of Fisher habitat in light of the  
19 massive die-off of trees in the Southern Sierras. SF0054-59. PSMFO 52.<sup>51</sup>

20 The Fisher Technical Team acknowledged a number of concerns related to the recent  
21 changed circumstances related to the massive die-off of trees from the drought:

22 The habitat analyses, models, and recommendations in the Strategy were based on  
23 vegetation conditions during its preparation, as reflected in datasets updated mostly  
24 as of 2012. However, since then, dramatic changes have occurred in Sierra Nevada

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25 <sup>50</sup> Defendants concede it is undisputed that the authors of the Southern Sierra Fisher Conservation Strategy issued the  
26 document titled "Changed Circumstances and Implementation of the Southern Sierra Nevada Fisher Conservation  
27 Strategy Note from the Authors, March 2017."

28 <sup>51</sup> Defendants object that the document speaks for itself. Defendants object that this misstates evidence and claim that  
the cited document did not identify weaknesses in the datasets. Rather, the cited document observed that "[t]here is no  
vegetation mapping program today that is updated annually and systematically," nor is there "a standard means of  
translating between on-ground (plot based) measurements and . . . remotely sensed metrics," which "makes evaluating  
changes in Fisher habitat conditions following disturbances very difficult."

1 mixed conifer forests due to drought and extraordinary tree mortality. The  
2 Strategy could not have anticipated nor account for such changes. SF0054.

3 PSUMF 53.<sup>52</sup> The Fisher Technical Team also cautioned:

4 There is no available research or direct observations concerning how massive  
5 changes in tree cover due to drought and insect mortality, including death in even  
6 the largest tree classes, may affect Fisher habitat use or population processes. There  
7 is also no direct evidence indicating how Fishers will respond to management  
8 actions being implemented by land managers in response to this mortality event.  
9 SF0054.

10 PSUMF 54.<sup>53</sup>

11 Citing fundamental weaknesses in the combination of datasets used to support the  
12 hexagon management grid system used by the Forest Service to track Fisher habitat suitability at  
13 the landscape level, the Fisher Technical Team stated that the landscape model was unreliable:

14 Until these issues are rectified, we do not recommend applying the original  
15 management grid system to evaluate the changes to unsuitable, potentially suitable,  
16 and suitable cells at this time. We also do not recommend applying the  
17 conservation targets, nor the Strategy description of target cells, at this time.  
18 SF0055.

19 PSMFO 55.<sup>54</sup> According to the Fisher Conservation Strategy's altered specifications, project-level  
20 analysis should now:

- 21 • Avoid treating two or more adjacent cells in a manner that reduces connectivity  
22 of remaining high reproductive habitat value (CWHR 4D, 5M, 5D, and 6)  
23 within and between cells.
- 24 • When treating cells within or adjacent to recently disturbed areas (e.g. severely  
25 burned or highly impacted by drought mortality), protect and promote  
26 connectivity within and between cells, and focus treatment on increasing  
27 resilience of remaining suitable habitat. SF0056.

28 PSMFO 56.<sup>55</sup> Moreover, according to the strategy's altered specifications, project-level analysis

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22 <sup>52</sup> Defendants: Undisputed that the cited documents contains this statement.

23 <sup>53</sup> Defendants: Undisputed that the cited documents contains this statement.

24 <sup>54</sup> Defendants concede it is undisputed that the cited document advised against using hexagon-suitability classes or  
25 numerical targets for green hexagons in the analysis of forest-management projects. However, Defendants object as  
26 follows: Misstates evidence. The cited document did not identify weaknesses in the datasets. Rather, the cited  
27 document observed that “[t]here is no vegetation mapping program today that is updated annually and systematically,”  
28 nor is there “a standard means of translating between on-ground (plot based) measurements and . . . remotely sensed  
metrics,” which “makes evaluating changes in Fisher habitat conditions following disturbances very difficult.”

<sup>55</sup> Defendants do not dispute that the cited document contains the excerpted language. However, Defendants object  
that this misstates evidence as the document describes these “bullets” as “suggested revisions” and does not assign  
them to a particular spatial scale for analysis.

1 should provide a more rigorous<sup>56</sup> analysis at the “Stand scale”:

2 Stand scale—this scale represents the availability of individual habitat features  
3 within the project area. Structural characteristics such as canopy cover or large tree  
4 availability should be evaluated for the proposed action and any alternatives, with  
5 availability of the structural characteristics projected into the future both with and  
6 without a simulated fire.

7 Select habitat characteristics relevant to the project area based on available research  
8 and strategy recommendations. The importance of habitat elements such as canopy  
9 cover, large tree and snag availability, and hardwood basal area has been repeatedly  
10 supported. Other factors, such as the acreage of moderate and high capability  
11 habitat as defined by CWHR 2.1, and high value reproductive habitat (CWHR 4D,  
12 5M, 5D, and 6) should also be included. We suggest evaluating at least the  
13 following:

- 14 ○ canopy cover
- 15 ○ large trees and snags
- 16 ○ hardwood basal area and total basal area
- 17 ○ remaining CWHR high reproductive value habitat pockets/refugia
- 18 ○ connectivity between pockets of high value reproductive habitat, as  
19 indicated by presence of other moderate and high capability habitat as  
20 defined by CWHR 2.1

21 Compare the current and projected availability of these elements under the  
22 management alternatives, as well as with and without wildfire, using FVS software.  
23 Note that FVS projections for canopy cover in particular are unlikely to align with  
24 SSNFCS recommendations (which are based on remotely-sensed metrics). One  
25 approach to addressing this issue has the following four steps: 1) compare the  
26 current FVS modeled value to the current EVEG value; 2) project stand  
27 characteristics forward using FVS; 3) measure the change in FVS from current to  
28 projected; 4) add or subtract this change from the current EVEG value and use the  
29 resulting number as the likely future condition. If possible, compare the trajectory of  
30 these habitat elements in the project area with the projected changes in fire  
31 characteristics such as flame length and torching index under the different  
32 alternatives.

33 Consider the cost vs. benefit of management alternatives, and look for opportunities  
34 to modify prescriptions to minimize negative impacts, while recognizing that short-  
35 term risk may be necessary to meet longer term conservation and resiliency  
36 objectives. SF0057-58.

37 PSUMF 57.

### 38 ***19. The Forest Service’s Supplemental Information Report of April 2017***

39 On April 12, 2017, the Forest Service issued a SIR and supporting materials to document  
40 the agency’s analysis of whether Frog will affect the environment in a significant manner or to a  
41 significant extent not already considered by the project’s 2013 Environmental Assessment. SF\_1–  
42

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43 <sup>56</sup> Defendants object that the phrase “more rigorous” is vague, ambiguous, and argumentative—not factual.  
44 Defendants do not dispute that the cited document otherwise contains the excerpted language.

1 47. DSMFO 109.<sup>57</sup> The SIR and its supporting materials predicted a slight drop (three percent) in  
2 canopy compared to baseline conditions, which were updated to reflect tree mortality since the  
3 2013 Environmental Assessment. SF\_8– 9, 19–27; Cordes Decl. ¶¶ 7–8. DSUMF 110.<sup>58</sup>

4 The SIR and its supporting materials predicted slight, short-term reductions in moderate  
5 and high-capability CWHR2.1 habitat and high-value reproductive habitat. SF\_9, 25–27. DSUMF  
6 111. At the home-range scale, the SIR and its supporting materials calculated only minor shifts in  
7 moderate and high-capability CWHR2.1 habitat and high-value reproductive habitat without any  
8 significant barriers to Fisher movement. SF\_9, 27–29. DSUMF 112. At the Core scale, the SIR  
9 and its supporting materials determined that Frog and other projects combined would affect only 4  
10 percent of the 109,919 acres of moderate and high-capability Fisher habitat, and only 3 percent of  
11 the 71,662 acres of high-value reproductive Fisher habitat, taking into account the 2016 Cedar  
12 Fire. SF\_10–12, 31, 36–37. DSUMF 113.

13 The SIR and its supporting materials determined that ground disturbance from Frog and  
14 other projects would not exceed recommended thresholds in affected hexagons. SF\_35–36.  
15 DSUMF 114. In issuing the SIR, the Forest Service recognized that tree mortality may continue  
16 for 1 to 3 years and was “likely to further lower habitat quality” generally. SF\_9. DSUMF 115.  
17 In issuing the SIR, the Forest Service found “no indication that implementation of the Frog Project  
18 would significantly impact or . . . contribute to a loss of viability of Fishers.” SF\_9–10. DSUMF  
19 116. In issuing the SIR, the Forest Service found that the Frog project area contains only a tiny  
20 percentage of habitat within the relevant Fisher Core, and the units are small and scattered  
21 throughout a wide geographic expanse. SF\_10. DSMFO 117.<sup>59</sup>

22 In issuing the SIR, the Forest Service concluded that treatments would not render any unit  
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24 <sup>57</sup> Plaintiff: Undisputed that the Forest Service issued the SIR that makes this assertion, but Plaintiff disputes that this  
25 analysis was sufficient to determine “whether Frog will affect the environment in a significant manner or to a  
26 significant extent not already considered by the project’s 2013 EA.”

27 <sup>58</sup> Plaintiff: Undisputed that the SIR makes this assertion. Plaintiff states this for DSUMFs 110-116.

28 <sup>59</sup> Plaintiff: Undisputed, that the SIR roughly makes this assertion, except that the SIR used the term “very small” and  
not “tiny,” and used the term “Project area” and not “wide geographic expanse.” Id.

1 unsuitable for Fishers, as defined by the CWHR 2.1 habitat model. SF\_10; F\_274. DSUMF 118.<sup>60</sup>  
2 In issuing the SIR, the Forest Service found that tree mortality is confined to lower elevations of  
3 the project area and underscores the need to maintain and promote resilience among the remaining  
4 living trees. SF\_10, 14–15; Cordes Decl. ¶ 10 & Ex. 1. DSMFO 119.<sup>61</sup> The SIR considered field  
5 reports on the project’s silvicultural prescriptions and fuel treatments based on updated tree-  
6 mortality information. SF\_2, 14–18. DSMFO 120.<sup>62</sup>

7 According to the Revised Frog Project Fuels Review 2017, “If left untreated, surface fuel  
8 accumulations will increase in existing and future areas of mortality . . . This increase in fuel  
9 loading will cause additional mortality in the event of an uncontrolled wildfire.” SF\_14. DSUMF  
10 121.<sup>63</sup> According to the 2017 Frog Project Silvicultural Review, tree mortality “makes the need to  
11 increase the resilience of the remaining stands of green trees urgent,” and “the Frog project is  
12 expected to result in a healthier, more resilient stand of trees.” SF\_16. DSUMF 122.<sup>64</sup>

13 Research indicates that “the risk of taking no action [is] a greater threat to Fisher and their  
14 habitat than a series of modeled fuels reduction projects with activities similar to the Frog  
15 Project.” SF\_21. DSUMF 123.<sup>65</sup> Frog’s 2013 Environmental Assessment and 2017 SIR and their  
16 supporting documents refer to “2010” as the existing condition or baseline. In other words, “2010”  
17 does not literally refer to calendar year 2010—it is “Year 0” of project implementation. F\_299,  
18 304, 309; SF\_20–21, 24–25, 28–29, 42, 44; Cordes Decl. ¶ 7 & n.2. DSUMF 124.

19 Because the SIR uses updated EVEG data that reflects recent mortality, canopy closure in

20 <sup>60</sup> Plaintiff: Undisputed that the SIR makes this assertion, but Plaintiff disputes this conclusion.

21 <sup>61</sup> Plaintiff: Objection. Misstates evidences. While the SIR makes the assertion that tree mortality is confined to lower  
22 elevations, Plaintiff has provided evidence that mortality is also high in the higher elevation units of the project area.  
23 See ECF # 47-5 (2nd Sheehey Decl. Ex. C). [NOTE: As stated below, the Court denied Plaintiff’s request to admit the  
second Sheehey declaration.] [. . .] Nevertheless, the Court may not rely on the post hoc declaration of Jeff Cordes,  
which is not in the record.

24 <sup>62</sup> Plaintiff: Objection, misstates evidence. The SIR does not describe the cited reports as “field reports,” and neither  
25 the Frog Project Silvicultural Review nor the Revised Frog Project Fuels Review-2017 contain any “field”  
information or other indications that Forest Service staff visited the field in support of their reviews. Id.

26 <sup>63</sup> Plaintiff: Undisputed that the review makes this assertion.

27 <sup>64</sup> Plaintiff: Undisputed that the review makes this assertion.

28 <sup>65</sup> Plaintiff: Undisputed that the Revised Fisher BE makes this assertion.

1 “2010” is reduced from levels previously analyzed, showing approximately 45 percent instead of  
 2 51 percent canopy closure in CWHR 2.1 habitat. F\_192, 299; SF\_1–3, 11, 19–20, 47a (ECF No.  
 3 41-4); Cordes Decl. ¶ 7 & n.2. DSMFO 125.<sup>66</sup> The Forest Service projected updated, existing  
 4 canopy closure into the future using different scenarios (implementation, no-action, wildfire) and  
 5 spatial scales. See, e.g., SF\_58–59, 20–21, 28–29, 42–45. DSUMF 126.<sup>67</sup> The SIR and its  
 6 supporting materials show canopy changes across all project units and watersheds. SF\_21, 29.  
 7 DSMFO 159.<sup>68</sup> The SIR and its supporting documents show that any reduction in canopy closure  
 8 across Frog’s units will be far less than 30 percent (in absolute terms) in high-reproductive Fisher  
 9 habitat. SF\_21, 47a (ECF No. 41-4), 57; see also Cordes Decl. ¶ 20 & Ex. 4 (showing changes in  
 10 canopy closure in mature forest habitat on a unit-by-unit basis). DSMFO 164.<sup>69</sup>

11 ***20. Forest Service’s Decision in 2017 to Proceed with the Frog Project but Requiring***  
 12 ***Supplemental NEPA Analysis for the Rancheria Project***

13 On April 12, 2017, the Forest Service issued its determination not to supplement its NEPA  
 14 analysis, and decided to proceed with the Frog Project. SF0001. PSUMF 22. Logging in the Frog  
 15 Project area may commence [in late September 2017]<sup>70</sup> at the earliest. SF0064.<sup>71</sup> PSUMF 23.<sup>72</sup>

16 \_\_\_\_\_  
 17 <sup>66</sup> Plaintiff: Objection. Misstates evidence. This is a post hoc rationalization by Defendant’s counsel made in the brief,  
 18 and there is no support anywhere in the SIR or Revised Fisher BE for this explanation. See *Or. Natural Desert Ass’n v.*  
 19 *Bureau of Land Management*, 531 F.3d 1114, 1141 (9th Cir. 2008) (explaining that courts may not accept counsel’s  
 20 post hoc rationalizations for agency action, and an agency’s action can only be upheld on the basis articulated by the  
 21 agency itself) (citations omitted). For the same reason, the Court may not rely on the post hoc declaration of Jeff  
 22 Cordes, which is not in the record.

23 <sup>67</sup> Plaintiff: Undisputed that the Forest Service included these canopy cover forecasts.

24 <sup>68</sup> Plaintiff: Objection. Misstates evidence. The SIR at SF0021 shows only the average canopy cover changes into the  
 25 future for CWHR 2.1 habitat in each unit and not all project units. SF0029 only shows the “Changes in percent of  
 26 canopy closure density class categories in CBI high value reproductive habitat within the 7th Order Watersheds” and  
 27 not all project areas. SF0028 only shows the “Changes in percent of canopy closure density class categories in  
 28 moderate and high suitability Fisher habitat defined by CWHR 2.1 within the 7th Order Watersheds affected by the  
 Frog Project area” and not canopy cover changes in all project areas.

<sup>69</sup> Plaintiff: Objection. Misstates evidence. The SIR and its supporting documents never show that the Frog Units meet  
 the standard from the 2004 Sierra Nevada Forest Plan Amendment, which requires documentation of canopy cover  
 reduction by treatment unit. Moreover, the average canopy cover changes shown in the SIR and its supporting  
 documents describe only canopy cover reduction of CWHR 2.1 and CBI high value Fisher habitat and not the  
 remaining portions of those units. Finally, the Court may not rely on the post hoc declaration of Jeff Cordes, which is  
 not in the record.

<sup>70</sup> This date was originally planned for August 2017.

1 Also on April 12, 2017, the Forest Service issued its determination that supplemental  
2 NEPA analysis must be prepared and the that the existing Rancheria Project’s Decision Notice and  
3 Finding of No Significant Information must be reconsidered in light of new circumstances and  
4 information. Dkt.# 42-1 at 13. PSUMF 24. It stated that suspension of the Rancheria timber sale  
5 contract shall remain in place while this supplemental NEPA analysis and reconsideration are  
6 being conducted, and all implementation of the existing Decision Notice for the Rancheria Project  
7 is stayed until a further determination is made. Id. PSUMF 25. “Impacts of the Rancheria Project  
8 have not yet been fully analyzed, and will be addressed in more detail in supplemental NEPA  
9 analysis because of mortality within the project area and because of the project’s location with  
10 respect to the Cedar Fire area.” SF1261. PSUMF 26. The Rancheria Project area is located  
11 several miles to the south of the Cedar Fire area. See SF0047 (map of projects in relation to Cedar  
12 Fire). PSUMF 27. Other projects in the vicinity of the Frog Project include the Summit Project,  
13 the Rancheria Project, and the Bull Run Project. SF0038. PSMFO 28.<sup>73</sup>

#### 14 ***21. Spear Creek Project***

15 Even though the Spear Creek Project has not yet been finalized, the Forest Service released  
16 very specific plans to proceed with this 1,250 to 1,500 acre project since November of 2016. See  
17 SF1314-15 (discussing specifics about both the Bull Run and specific size and form of the Spear  
18 Creek project). PSMFO 29.<sup>74</sup> On May 1, 2017, the Forest Service issued a second scoping notice  
19 for the Spear Creek Project, which proposes the same exact project<sup>75</sup> along the same roads as  
20 described during initial scoping. See Voss Dec., Exhibit D (describing the same treatments as the  
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22 <sup>71</sup> The parties have signed a stipulation to wait until receiving this order before any logging (if allowed) can  
23 commence.

24 <sup>72</sup> The parties signed a stipulation file on August 25, 2017 to wait until September 20, 2017 before commencing any  
25 logging, with the understanding that the Court will issue its order before then (unless the Court permits the logging to  
26 commence earlier). Doc. No. 63.

27 <sup>73</sup> Defendants object that the phrase “in the vicinity” is vague and ambiguous.

28 <sup>74</sup> Defendants object that the phrase “very specific” is vague, ambiguous, and argumentative—not factual.

<sup>75</sup> Defendants object to the characterization “the exact same project” as argumentative and unsupported by the  
evidence cited. Defendants: Undisputed that the Forest Service issued a scoping notice for the Spear Creek project  
dated May 1, 2017.



1 original proposal and showing a map on the last page, which is identical to the one in SF1323,  
2 released with initial scoping). PSUMF 30.

3 When the SIR was prepared, the proposed Spear Creek Roadside Hazard Tree Project did  
4 not have specific acreage or prescriptions. SF\_11. DSMFO 153.<sup>76</sup> The Forest Service found that  
5 including Spear Creek at the home-range scale was unnecessary because it will not overlap with  
6 hexagons affected by the Frog project and thus will not contribute to the 13 percent Conservation  
7 Strategy threshold for mechanical treatments. SF\_11. DSUMF 154.<sup>77</sup> The Forest Service found  
8 that including Spear Creek at the Core scale was unnecessary because the project would primarily  
9 fell hazard trees along roads, which are considered lower quality habitat for Fishers. SF\_11, 37;  
10 Cordes Decl. ¶ 27. DSMFO 155.<sup>78</sup> Summit CE, Bull Run, and Spear Creek will each receive their  
11 own environmental review and analysis, including consideration of cumulative effects. Second  
12 Voss Decl. (ECF No. 47-3) Ex. D, at 3; Cordes Decl. ¶ 27. DSMFO 156.<sup>79</sup>

## 13 **22. Sequoia National Forest Plan**

14 The Sequoia National Forest Plan includes a Desired Condition that “[w]ithin known or  
15 estimated female Fisher home ranges outside the [Wildland Urban Interface] (“WUI”), a minimum  
16 of 50 percent of the forested area has at least 60 percent canopy cover. Where home range  
17 information is lacking, use HUC 6 watershed as the analysis area for this desired condition.”  
18 Record of Decision (“ROD”) for the 2004 SNFPA, Appendix A at 41. Located in the  
19 Administrative Record as “AUR” (available upon request) just below SF1151. Relevant pages  
20 provided as Voss Dec., Exhibit C. PSUMF 58.<sup>80</sup> The Sequoia National Forest Plan Standard for  
21

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22 <sup>76</sup> Plaintiff: Objection. Misstates evidence. The Spear Creek Project was first scoped in late-2016 with a proposed size  
23 of 1,500 acres. SF1314. The November 30, 2016 letter from Eric LaPrice included a specific proposal “for a 300 ft.  
24 treatment area for each side of the road” and map showing each of the roadways in the Giant Sequoia National  
25 Monument portion of the Cedar Fire area where treatments were proposed. Id. & SF1323.

26 <sup>77</sup> Plaintiff: Undisputed that this is what the SIR asserts.

27 <sup>78</sup> Plaintiff: Undisputed that this is what the SIR asserts, except that the Court may not rely on the post hoc declaration  
28 of Jeff Cordes, which is not in the record.

<sup>79</sup> Plaintiff: Objection. The Court may not rely on the post hoc declaration of Jeff Cordes, which is not in the record.

<sup>80</sup> Defendants object that this misstates evidence. The language is located in the 2004 Sierra Nevada Forest Plan  
Amendment.

1 thinning projects requires that

2 For mechanical thinning treatments in mature forest habitat (CWHR types 4M, 4D,  
3 5M, 5D, and 6) outside WUI defense zones:

\* \* \*

- 4 • Design projects to avoid reducing pre-existing canopy cover by more than 30  
5 percent within the treatment unit. Percent is measured in absolute terms (for  
6 example, canopy cover at 80 percent should not be reduced below 50 percent.)

7 Voss Dec., Exhibit C (ROD for the SNFPA, Appendix A at 50). PSUMF 59.<sup>81</sup>

8 The SIR's presentation of canopy changes is the same format used in the 2013  
9 Environmental Assessment. Pl.'s Mot. Summ. J. (ECF No. 47), at 35; F\_299, 323, 2027, 2050;  
10 SF\_20, 28. DSUMF 160.<sup>82</sup> In its comments on the 2013 Environmental Assessment, SF Keeper  
11 never contended that the 2013 Environmental Assessment's presentation of canopy changes was  
12 inconsistent with the 2004 Sierra Nevada Forest Plan Amendment. F\_1690-97. DSUMF 161.<sup>83</sup>  
13 Also in its comments on the 2013 Environmental Assessment, SF Keeper claimed the 2004 Sierra  
14 Nevada Forest Plan Amendment was illegal and should not be applied to Frog. F\_1692. DSMFO  
15 162.<sup>84</sup>

16 In the SIR and its supporting documents, the Forest Service affirmed that Frog was  
17 designed pursuant to the 2004 Sierra Nevada Forest Plan Amendment, which implemented  
18 specific standards and guidelines that would be beneficial in conserving habitat for species such as  
19 the Fisher, including provisions for maintenance of canopy closure. SF\_36. DSUMF 163.<sup>85</sup>  
20 Minor adjustments in project implementation noted in the Frog Project Fuels Review will reduce

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21 <sup>81</sup> Defendants object that this misstates evidence. The language is located in the 2004 Sierra Nevada Forest Plan  
22 Amendment as a Forest-wide Standard and Guideline.

23 <sup>82</sup> Plaintiff: Undisputed, except that there is no reference to this at Pl.'s Mot. Summ. J. Brief at 35.

24 <sup>83</sup> Plaintiff: Undisputed, except that sufficient canopy cover has been one of the primary issue expressed in comments  
25 when expressing concerns about the Frog Project. See F1657 ("The Revised EA does not properly evaluate the  
26 significant impacts of logging on ... canopy cover..." and "The project allows logging of large trees up to 30" dbh and  
27 significant overall canopy cover reductions at the stand and landscape scale.")

28 <sup>84</sup> Plaintiff: Objection. Misstates evidence. Plaintiff did not claim that the Amendment was illegal, but referred to  
29 comments by the John Muir Project, stating that "Because the 2004 Framework has been deemed illegal, the Forest  
30 Service should be using the 2001 Sierra Nevada Framework for this project." Id.; see SF1700 ("The federal courts  
31 have ruled that the 2004 Framework forest plan is illegal under NEPA in two different decisions.").

<sup>85</sup> Plaintiff: Undisputed that the SIR and its supporting documents made this assertion.

1 the possibility of adverse effects. SF\_15. DSUMF 165.<sup>86</sup> The underlying data for the Forest  
2 Service's SIR and its supporting materials were disclosed and available to SF Keeper at all times.  
3 ECF No. 35, at 1; ECF No. 41-3, at 2. DSMFO 166.<sup>87</sup>

### 4 **23. Frog's Project Design Features**

5 The Frog Project is a mechanical thinning project, which includes 26 treatment units  
6 located in mature forest habitat (CWHR types 4M, 4D, 5M, 5D, and 6) and is located outside the  
7 WUI and WUI defense zones. SF0022. PSMFO 60.<sup>88</sup> Frog's project design features include  
8 retaining at least 40 percent canopy cover. F\_274, 304, 309. DSMFO 71.<sup>89</sup> Frog's project design  
9 features include retaining all trees over 30 inches in diameter at breast height ("dbh") and all  
10 hardwoods greater than or equal to 12 inches dbh (except hazard trees), which would ensure  
11 adequate trees within the size range used by Fishers for rest sites. F\_219. DSMFO 72.<sup>90</sup>

12 Frog's project design features include retaining at least 180 square feet of basal area per  
13 acre, which exceeds the 150 square feet per acre suggested by the CBI in the Southern Sierra  
14 Nevada Fisher Conservation Strategy ("Fisher Strategy") published in 2016. F\_262; SF\_193.

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15  
16  
17 <sup>86</sup> Plaintiff: Undisputed, that the Fuels Review makes this assertion.

18 <sup>87</sup> Plaintiff: Objection. Misstates evidence. The Forest Service is referring to "geographic-information-system data  
19 supporting CBI's review and analysis of updated vegetation information" and "Forest Vegetation Simulator (FVS)  
20 data produced [in] December 2016 reflecting vegetation gathered as of July 2016." While the Forest Service did make  
21 the CBI data available to Plaintiff, it did not actually use the data in its analysis, stating that it "did not rely on or apply  
22 results from the new CBI management grid system analysis at [the] project level for the Frog project." SF0007. The  
23 FVS data produced in December 2016 is not useful to the Plaintiff in a way, because it "is run using the Suppose  
24 graphical user interface" (ECF # 41-3 at 2), which is both proprietary and unavailable to Plaintiff or the public.

25 <sup>88</sup> Defendants concede it is undisputed that the Frog project includes mechanical treatments in mature forest habitat  
26 (CWHR types 4M, 4D, 5M, 5D, and 6) located outside a WUI and WUI defense zone. Defendants object that this  
27 misstates evidence: the cited document shows 26 treatment units within the Frog project containing moderate to high-  
28 quality CWHR 2.1 Fisher habitat modeled in 2021 under pre- and post-wildfire conditions.

29 <sup>89</sup> Plaintiff: Undisputed that the 2001 design features include this goal, except that the 2016 Southern Sierra Nevada  
30 Fisher Conservation Strategy ("Fisher Strategy"), instead, suggests that, "[a]t the home range scale, >50% of a target  
31 cell supports tree canopy cover > 70% (as measured by EVEG), with dense stands patchily distributed in mosaic with  
32 patches of more open (<40% cover) and moderate (40-69%) canopy forest to provide habitat heterogeneity." SF\_193.

33 <sup>90</sup> Plaintiff: Undisputed that the 2001 design features include this goal, except that the 2016 Fisher Strategy includes  
34 several additional "Fisher habitat elements," including large living and dead trees (snags), structures used by Fishers  
35 for resting and denning, snags in all size classes, and certain tonnages of large logs with some patches of high  
36 abundance. SF\_194.

1 DSMFO 73.<sup>91</sup> Frog’s project design features include retaining oak trees, which provide important  
2 habitat for Fishers and their prey. F\_295–96. DSUMF 74.<sup>92</sup> Frog’s project design features include  
3 imposing a “limited operating period” to avoid project activity when female Fishers and their  
4 offspring are least mobile and most vulnerable. F\_623, 336. DSUMF 75.<sup>93</sup> There now remain  
5 1,027 acres of Frog to be treated, and about 500 of these acres are in Fisher habitat. SF\_63, 42, 8.  
6 DSUMF 79.

7 The Forest Service found that during the years between Frog’s 2010 stand exams and July  
8 2016, moderate and high-capability CWHR 2.1 habitat in the project area declined by only 2  
9 percent, thus making new stand exams unnecessary. SF\_47a, 8, SF\_2; Cordes Decl. ¶ 10. DSMFO  
10 132.<sup>94</sup> The Frog Project is treating fir stands between 6,500 and 8,000 feet in elevation, where  
11 mortality levels are much lower and the proposed treatments are expected to lower the competitive  
12 stress on individual trees and lessen future mortality. SF\_16. DSMFO 133.<sup>95</sup>

13 The risk of a fire happening under adverse conditions in the Frog project area is very high.  
14 The type of treatments planned would create low surface fuel loads, significantly decreasing the  
15 probability of uncharacteristically severe wildfire effects while sustaining large trees and dense  
16 canopy cover suitable for Fisher habitat. SF\_21. DSUMF 134.<sup>96</sup> Core Area 2 covers a wide  
17 geographic area, encompassing a number of different habitat types at different elevations which  
18

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19 <sup>91</sup> Plaintiff: Objection. Misstates evidence. The 2016 Fisher Strategy instead states that “[w]ithin each Fisher target  
20 cell, basal area of mixed-conifer forest averages > 150 ft<sup>2</sup>/ac, ranging from ~ 100 ft<sup>2</sup>/ac to >400 ft<sup>2</sup>/ac at finer scales,  
depending on site conditions.” SF\_193. Plaintiff concedes that it is undisputed that the 2001 design features include  
this goal.

21 <sup>92</sup> Plaintiff: Undisputed that the 2001 design features include this goal.

22 <sup>93</sup> Plaintiff: Undisputed that the 2001 design features include this goal.

23 <sup>94</sup> Plaintiff: Undisputed that the cited references makes those assertions, but the Court may not rely on the post hoc  
24 declaration of Jeff Cordes, which is not in the record.

25 <sup>95</sup> Plaintiff: Undisputed that the Silvicultural Review makes that assertion; however, Plaintiff disputes that the  
26 mortality levels are “much lower” in those areas, which is contradicted by the GoogleEarth aerial photographs and the  
27 Forest Service’s own Aerial Detection Survey data. See ECF # 47-5 (2nd Sheehey Decl. Ex. C); ECF # 47-4 (2nd  
Hanson Decl. Ex. B). [NOTE: The Court declines to review these declarations since as set forth below, the Court  
denied Plaintiff’s request to admit the second declarations of Dr. Chad Hanson and Ms. Alison Sheehey. Any facts  
relying solely on these declarations will not be considered by the Court.]

28 <sup>96</sup> Plaintiff: Undisputed that the Revised Fisher BE makes that assertion.

1 are not impacted equally by the current mortality event. SF\_10. DSUMF 135.

2 **24. The Forest Service's Findings on Fisher Dispersal Routes During Frog**

3 The Forest Service found that Frog's treatments would not cause barriers to movement  
4 across the Fisher home ranges (or "cells") overlapping the project area. SF\_27. DSUMF 136.<sup>97</sup>  
5 Connectivity between home ranges will be maintained throughout the implementation of Frog by  
6 design criteria, including riparian zones and no treatments areas. The inclusion of untreated areas  
7 along steep sloped regions and riparian corridors will maintain habitat connectivity and Fisher  
8 dispersal routes both within and outside of the Frog project area. SF\_28. DSUMF 137.<sup>98</sup> Frog  
9 will use existing timber landings to minimize disruption of the vegetative covers used for dispersal  
10 of Fishers. Dense cover is also retained along stream corridors and other features outside of the  
11 units. SF\_28. DSUMF 138.<sup>99</sup>

12 The Forest Service identified and assessed Frog's effects on Fisher habitat characteristics  
13 in the project area, including canopy closure and other Fisher habitat components in the CWHR  
14 classification system, such as tree types and tree size. SF\_22–25. DSMFO 139.<sup>100</sup> Tree size and  
15 canopy correlate with basal area. SF\_17. DSMFO 140.<sup>101</sup> CBI's March 2017 guidance document  
16 describes a "stand scale" analysis as representing "the availability of individual habitat features  
17 within the project area." SF\_57. DSMFO 141.<sup>102</sup> CBI's March 2017 guidance document  
18 recognizes that "short-term risk may be necessary to meet longer term conservation and resiliency

19 <sup>97</sup> Plaintiff: Undisputed that the Revised Fisher BE makes that assertion at SF0028.

20 <sup>98</sup> Plaintiff: Undisputed that the Revised Fisher BE makes that assertion.

21 <sup>99</sup> Plaintiff: Undisputed that the Revised Fisher BE makes that assertion.

22 <sup>100</sup> Plaintiff: Objection. Misstates facts. The pages referenced are of various charts, which tabulate the amount of  
23 CWHR 2.1 habitat for the no action and action alternatives after a decade of growth. *Id.* They do not assess the Frog  
24 Project's effects in the project area, they do not directly identify Fisher habitat characteristics, and they do not identify  
25 canopy closure.

26 <sup>101</sup> Plaintiff: Objection. Misstates facts. The cited page asserts that there is a correlation between basal area and canopy  
27 cover: "180 square feet basal area per acre (correlates to 45% canopy cover)." SF0017.

28 <sup>102</sup> Plaintiff: Undisputed that the CBI guidance refers to stand scale in that way; however, "stand scale" must be able  
to distinguish "individual habitat features within the project area" which may be different than the project area as a  
whole. The commonly-accepted definition of a forest stand is "a contiguous community of trees sufficiently uniform  
in composition, structure, age and size class distribution, spatial arrangement, site quality, condition, or location to  
distinguish it from adjacent communities." Nyland, Ralph D. (2007). *Silviculture: concepts and applications*, 2nd ed.  
Prospect Heights: Waveland Press.

1 objectives.” SF\_58. DSUMF 142.<sup>103</sup>

2 **25. The Forest Service’s Review of the Cedar Fire Area**

3 The Forest Service compared vegetation levels before and after the Cedar Fire to identify  
4 areas of habitat change at or above 50 percent. The Forest Service excluded these areas from  
5 calculations of CWHR 2.1 and high-value reproductive habitat. SF\_11, 47a (ECF No. 41-4).  
6 DSUMF 143.<sup>104</sup> The Forest Service found that the Cedar Fire resulted in a loss of less than 5  
7 percent of both CWHR 2.1 and CBI habitat in Fisher Core Area 2 and concluded that the effects of  
8 the fire alone were not likely to threaten the viability of the sub-population. SF\_10. DSUMF  
9 144.<sup>105</sup> The Forest Service determined that Fishers south of the Cedar Fire area may be at greater  
10 risk in the long-term due to isolation. SF\_10. DSUMF 145.<sup>106</sup> The Frog project sits north of the  
11 Cedar Fire and remains connected with the Core Area 2 of the Sierra Fisher sub-population.  
12 SF\_46–47. DSMFO 146.<sup>107</sup>

13 Vegetation data are not updated systematically and frequently enough to predict changed  
14 habitat for project planning purposes. SF\_55, 1261; Cordes Decl. ¶ 21. DSMFO 147.<sup>108</sup> The  
15 Forest Service appraised ongoing mortality qualitatively at the cumulative-effects scale and found  
16 that Frog would not significantly impact or contribute to a loss of Fisher viability in Core Area 2.  
17 SF\_9–10; Cordes Decl. ¶ 21. DSMFO 148.<sup>109</sup> The Forest Service expects that implementing Frog  
18 will help curb the mortality rates observed at lower elevations in the project area. SF\_10; Cordes  
19

20 <sup>103</sup> Plaintiff: Undisputed that the guidance includes this opinion.

21 <sup>104</sup> Plaintiff: Undisputed that the Forest Service asserts this.

22 <sup>105</sup> Plaintiff: Undisputed that the Forest Service asserts this.

23 <sup>106</sup> Plaintiff: Undisputed that the Forest Service asserts this.

24 <sup>107</sup> Plaintiff: Objection. Misstates evidence. This citation is of two maps, which show the various projects and the  
25 Cedar Fire area in relation to the Core 2 area. While the Frog Project is north of the Cedar Fire and it is in the Core 2  
area, the other projects and the Cedar Fire area still remain within and connected to the Core 2 area.

26 <sup>108</sup> Plaintiff: Undisputed, except that the Court may not rely on the post hoc declaration of Jeff Cordes, which is not in  
the record.

27 <sup>109</sup> Plaintiff: Undisputed, that the Forest Service only appraised ongoing mortality qualitatively and that it asserts there  
28 would be no loss of viability on this basis, except that the Court may not rely on the post hoc declaration of Jeff  
Cordes, which is not in the record.

1 Decl. ¶ 22. DSMFO 149.<sup>110</sup> In the SIR, the Forest Service confirmed that any impacts to Fishers  
2 from further mortality would be monitored and addressed as new vegetation data becomes  
3 available. SF\_10; Cordes Decl. ¶ 22. DSMFO 150.<sup>111</sup>

4 Some available estimates of tree mortality rates provide ranges of 2,000 to 14,000 dead  
5 trees per square mile within 6.5 square mile grid cells. SF\_1274, 1276. DSUMF 151.<sup>112</sup> The  
6 Forest Service and its experts recognize the dramatic extent of tree mortality across the landscape,  
7 as well as uncertainty about how Fisher population processes writ large might respond over time.  
8 SF\_9–10, 54. DSUMF 157. Frog consists of 26 small, scattered units with less than 1 square mile  
9 of Fisher habitat combined. SF\_42, 63, 8. DSUMF 152.<sup>113</sup> Frog’s treatments are well understood  
10 and are not so uncertain or unknown as to present potentially significant effects. SF\_1261; Cordes  
11 Decl. ¶ 25. DSMFO 158.<sup>114</sup>

## 12 LEGAL STANDARD

### 13 **A. NEPA Requirements**

14 “NEPA is a procedural statute that requires the federal government to carefully consider  
15 the impacts of and alternatives to major environmental decisions. 42 U.S.C. §§ 4321, 4331. Its  
16 purpose is to ensure that federal agencies take a ‘hard look’ at the environmental consequences of  
17 their proposed actions before deciding to proceed.” Native Ecosystems Council v. Weldon, 697  
18 F.3d 1043, 1051 (9th Cir. 2012) (citing to Robertson v. Methow Valley Citizens Council, 490 U.S.

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19  
20  
21 <sup>110</sup> Plaintiff: Undisputed, that the Forest Service makes this assertion, except that the Court may not rely on the post hoc declaration of Jeff Cordes, which is not in the record.

22 <sup>111</sup> Plaintiff: Undisputed, except that the Court may not rely on the post hoc declaration of Jeff Cordes, which is not in the record.

23 <sup>112</sup> Plaintiff: Undisputed, which is equivalent to a tree mortality rate ranging from roughly 3 to 22 dead trees per acre (at 640 acres per square mile).

24 <sup>113</sup> Plaintiff: Undisputed, except that “small” is a vague and relative term. The units range from roughly 20 to 60 acres in size and many are contiguous with each other. See SF0022 & 42.

25 <sup>114</sup> Plaintiff: Objection. Misstates evidence. The SIR itself does not address the uncertainty, which is expressed in a letter to Plaintiff. That letter references three scientific studies, which are unrelated to drought-related tree mortality or Fishers to minimize the highly uncertain nature of the potential effects express by the Forest Service’s own Fisher experts. SF1261; see SF0439, 0446, and 0273 (studies). Moreover, the Court may not rely on the post hoc declaration of Jeff Cordes, which is not in the record.

1 332, 350–51 (1989)). To do so, an agency may prepare an Environmental Assessment—a “concise  
2 public document” that briefly provides sufficient evidence for the agency either to issue a Finding  
3 of No Significant Impact (also referred to as a “FONSI”), or an Environmental Impact Statement  
4 (also referred to as an “EIS”) that further analyzes significant impacts on the environment. See 40  
5 C.F.R. §§ 1501.4, 1508.9. “Although NEPA establishes procedures by which agencies must  
6 consider the environmental impacts of their actions, it does not dictate the substantive results of  
7 agency decision making.” Native Ecosystems Council, 697 F.3d at 1051.

8 Under NEPA, an agency must supplement an Environmental Assessment or EIS if new  
9 information shows “that the remaining action will ‘affec[t] the quality of the human environment’  
10 in a significant manner or to a significant extent not already considered.” Marsh v. Oregon Nat.  
11 Res. Council, 490 U.S. 360, 374 (1989) (alteration in original, citation omitted). “[A]n agency  
12 need not supplement an EIS every time new information comes to light after the EIS is finalized.”  
13 Id. at 373; see also Japanese Vill., LLC v. Fed. Transit Admin., 843 F.3d 445, 459 (9th Cir. 2016)  
14 (same). “To require otherwise would render agency decisionmaking intractable, always awaiting  
15 updated information only to find the new information outdated by the time a decision is made.”  
16 Marsh, 490 U.S. at 373; see also Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council,  
17 Inc., 435 U.S. 519, 554–55 (1978) (“Administrative consideration of evidence . . . always creates a  
18 gap between the time the record is closed and the time the administrative decision is promulgated  
19 [and, we might add, the time the decision is judicially reviewed] . . . . If upon the coming down of  
20 the order litigants might demand rehearings as a matter of law because some new circumstance  
21 has arisen, some new trend has been observed, or some new fact discovered, there would be little  
22 hope that the administrative process could ever be consummated in an order that would not be  
23 subject to reopening.”) (citation omitted); Japanese Vill., LLC, 843 F.3d at 466 (same).

24 When new information surfaces, an agency may satisfy NEPA by “carefully consider[ing]  
25 the information, evaluat[ing] its impact, and support[ing] its decision not to supplement . . . with a  
26 statement of explanation or additional data” *i.e.*, a Supplemental Information Report. Animal Def.  
27 Council v. Hodel, 840 F.2d 1432, 1439–40 (9th Cir. 1988), modified, 867 F.2d 1244 (9th  
28 Cir.1989); see also Price Rd. Neighborhood Ass'n, Inc. v. U.S. Dep't of Transp., 113 F.3d 1505,



1 1510 (9th Cir. 1997) (citing to *Animal Def. Counsel* and noting that “agency decision not to  
 2 supplement EIS in light of new information was reasonable where agency ‘carefully considered  
 3 the information, evaluated its impact, and supported its decision not to supplement with a  
 4 statement of explanation.’”)

5 ***B. Summary Judgment Under the APA for Agency Decisions Under NEPA***

6 Section 706 of the Administrative Procedure Act (“APA”) governs judicial review of  
 7 agency decisions made pursuant to NEPA. 5 U.S.C. § 706; City of Sausalito v. O’Neill, 386 F.3d  
 8 1186, 1205–06 (9th Cir. 2004). Summary judgment is governed by the APA’s “arbitrary and  
 9 capricious standard” instead of the typical summary judgment standard that determines whether  
 10 there are disputed issues of material fact. See Alaska Wilderness League v. Jewell, 788 F.3d 1212,  
 11 1217 (9th Cir. 2015) (“We review the grant of summary judgment de novo, thus reviewing  
 12 directly the agency’s action under the [APA’s] arbitrary and capricious standard.”); Nw.  
 13 Motorcycle Ass’n v. U.S. Dep’t of Agric., 18 F.3d 1468, 1472 (9th Cir. 1994) (“As mentioned  
 14 previously, this case involves review of a final agency determination under the [APA] therefore,  
 15 resolution of this matter does not require fact finding on behalf of this court. Rather, the court’s  
 16 review is limited to the administrative record . . . .”)<sup>115</sup>

17 Under the APA, the reviewing court may set aside agency actions only if found to be  
 18 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §  
 19 706(2)(A); Nw. Env’tl. Advocates v. Nat’l Marine Fisheries Serv., 460 F.3d 1125, 1132 (9th Cir.  
 20 2006) (same). “An agency’s action is arbitrary and capricious if the agency fails to consider an  
 21 important aspect of a problem, if the agency offers an explanation for the decision that is contrary  
 22 to the evidence, if the agency’s decision is so implausible that it could not be ascribed to a  
 23 difference in view or be the product of agency expertise, or if the agency’s decision is contrary to  
 24 the governing law.” Organized Vill. of Kake v. U.S. Dep’t of Agric., 746 F.3d 970, 974 (9th Cir.

25 \_\_\_\_\_  
 26 <sup>115</sup> “The court reviews final agency actions under the [APA]. The court does not determine whether there are disputed  
 27 issues of material fact as it would in a typical summary judgment proceeding; its review is based on the administrative  
 28 record. 5 U.S.C. § 706(2)(F); [Nw. Motorcycle Ass’n, 18 F.3d at 1472]; *see also* South Yuba River Citizens League v.  
Nat’l Marine Fisheries Serv., 723 F.Supp.2d 1247, 1256 (E.D.Cal.2010) (usual summary judgment standards do not  
 apply). The court must consider whether the agency’s actions, findings and conclusions are ‘arbitrary, capricious, an  
 abuse of discretion, or otherwise not in accordance with the law....’ 5 U.S.C. § 706(2)(A).” W. Watersheds Project v.  
Bureau of Land Mgmt., 971 F. Supp. 2d 957, 968–69 (E.D. Cal. 2013).

1 2014), on reh'g en banc, 795 F.3d 956 (9th Cir. 2015) (citation omitted).

2 “The arbitrary or capricious standard is a deferential standard of review under which the  
3 agency's action carries a presumption of regularity. Although the court's inquiry must be searching  
4 and careful, ... the ultimate standard of review is a narrow one. Thus, [e]ven when an agency  
5 explains its decision with less than ideal clarity, a reviewing court will not upset the decision on  
6 that account if the agency's path may be reasonably discerned. It is not the reviewing court's task  
7 to make its own judgment about the appropriate outcome . . . . The court's responsibility is  
8 narrower: to determine whether the agency complied with the procedural requirements of the  
9 APA.” San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 994 (9th Cir. 2014)  
10 (citations and internal quotations omitted).

11 “[W]hile [courts] carefully scrutinize an agency's actions under NEPA, [courts] must be  
12 mindful to defer to agency expertise, particularly with respect to scientific matters within the  
13 purview of the agency.” Ground Zero Ctr. for Non-Violent Action v. United States Dep't of Navy,  
14 860 F.3d 1244, 1254 (9th Cir. 2017) (citations omitted). “A court generally must be ‘at its most  
15 deferential’ when reviewing scientific judgments and technical analyses within the agency's  
16 expertise. *See Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).  
17 The court is not to ‘act as a panel of scientists that instructs the [agency] ..., chooses among  
18 scientific studies ..., and orders the agency to explain every possible scientific uncertainty.’  
19 [Citation].” N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1075 (9th Cir.  
20 2011). “And ‘[w]hen specialists express conflicting views, an agency must have discretion to rely  
21 on the reasonable opinions of its own qualified experts even if, as an original matter, a court might  
22 find contrary views more persuasive.’ [Citation] (quoting [*Marsh*, 490 U.S. at 378]).” N. Plains  
23 Res. Council, Inc., 668 F.3d at 1075. “Agencies are normally entitled to rely upon the reasonable  
24 views of their experts over the views of other experts.” Ground Zero Ctr. for Non-Violent Action,  
25 860 F.3d at 1254.

**DISCUSSION**<sup>116</sup>

***A. Whether the Frog Project Violates NEPA***

a. Whether the Forest Service Failed to Consider Significant New Circumstances

SF Keeper argues that the Frog Project violates NEPA because the Forest Service failed to consider “significant” new circumstances as enumerated below. On April 12, 2017, the Forest Service released a SIR signed by the Forest Supervisor stating in part that: “I have carefully considered the information pertaining to vegetation changes from tree mortality and recent wildfires provided above. These changes are not significant . . . . The existing environmental analysis is adequate to support the original decision. The information included in this SIR validates that position.” SF\_13. For the reasons that follow, the Court finds that Defendants have not violated NEPA.

i. Canopy Cover Reductions

SF Keeper has “raised concerns that the massive tree die-off could adversely affect the suitability of Fisher habitat by reducing canopy cover even before logging.” Pl’s Mtn at 15 (citing to SF1279 (comments)); SF1515-15 (Dr. Barrett Dec. ¶ 14) & SF1459-60 (1st Dr. Hanson Dec. ¶¶ 12-13 (because canopy cover has changed due to the die-off, the impacts from proposed logging must be re-analyzed at the stand level)). SF Keeper argues that the Forest Service has failed to determine or disclose current canopy cover reductions from the tree die-off as well as canopy cover reductions from subsequent Project activities at the stand or treatment unit level. SF Keeper argues that canopy cover is essential: “Fishers are associated with moderate to dense forest canopy. The most consistent predictor of fisher occurrence at large spatial scales was moderate to high amounts of contiguous canopy cover rather than specific habitat type. Research has suggested that inadequate canopy cover limits fisher distribution across forest types and ecoregions.” F00282 (Frog Fisher BE); see also SF1515 (Dr. Barrett Dec. at ¶ 12).

The Forest Service used its own methodology to analyze canopy cover. In Frog’s 2013 Environmental Assessment and supporting documents, existing canopy in the project area was

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<sup>116</sup> To the extent that either party bases an argument solely on extra-record evidence which the Court declines to admit as set forth in Section II, the Court will not address such arguments.

1 determined using habitat information that was current as of 2010. SF\_3, 4. Therefore, even though  
2 operations would not begin until after 2013, Frog’s environmental analysis referred to “2010” as  
3 the baseline in the project area. F\_299, 304, 309 (“Figure 3 displays the anticipated decrease in  
4 canopy cover from existing condition [labeled “2010”] to those expected post treatment.”). In  
5 other words, “2010” does not literally refer to calendar year 2010—it is “Year 0” of project  
6 implementation. Similarly, “2030” and “2060” refer to Years 20 and 50 from project  
7 implementation, respectively. See F\_299, 304.

8 For consistency, Frog’s 2017 SIR and its underlying materials follow this convention and  
9 identify “2010” as “Year 0” for project implementation. SF\_20–21, 24–25, 28–29, 42, 44. Because  
10 the SIR uses updated EVEG data that reflects recent mortality (SF\_1–3, 11, 19, 47a [ECF No. 41-  
11 4]), canopy closure at “Year 0” is reduced from the levels previously analyzed, showing  
12 approximately 45 percent instead of 51 percent canopy closure in CWHR 2.1 habitat. F\_192, 299  
13 & SF\_20. Consistent with CBI’s guidance (which largely follows the approach in the 2013  
14 Environmental Assessment), the Forest Service projected this updated, existing canopy closure  
15 into the future using different scenarios (implementation, no-action, wildfire) and spatial scales.  
16 See, e.g., SF\_58–59, 20–21, 28–29, 42–45.

17 Therefore, SF Keeper is incorrect when it claims the Forest Service did not consider how  
18 baseline canopy has changed since the 2013 EA, *i.e.*, “the amount of canopy cover reduction from  
19 tree mortality prior to logging,” and “how the Frog Project will further reduce canopy cover.”  
20 SF Keeper fails to recognize that “2010” refers to the existing conditions at the time of project  
21 implementation (not calendar year 2010), which the Forest Service updated to reflect mortality and  
22 other changes since the 2013 EA.

23 The Court finds that Defendants’ actions in addressing canopy cover were not arbitrary or  
24 capricious.

25 ii. Future Tree Mortality and Current or More Recent Vegetation Data

26 SF Keeper argues that Defendants failed to adequately consider and analyze predicted  
27 future tree mortality. SF Keeper further argues that Defendants improperly relied on existing  
28 vegetation data obtained in July 2016 for Defendants’ analysis completed in March 2017. SF

1 Keeper argues that many more trees died during the summer and fall of 2016 and claims that the  
2 Forest Service should have used new data from November 2016, which show “an additional 36  
3 million dead trees.”

4 As an initial matter, the claimed “new data” of an additional 36 million dead trees is a  
5 figure from Aerial Detection Surveys that simply tally the number of dead trees observed during  
6 flights over millions of acres across the entire state of California. SF\_1287, 92–98.19. This is not  
7 a new EVEG layer for the Sequoia National Forest, which is a much more precise and detailed  
8 analysis. The Forest Service updated its baseline vegetation and habitat information by (1)  
9 obtaining high-resolution aerial imagery of the Sequoia National Forest in mid-July 2016, and  
10 then (2) converting these images into a computer-generated map of existing vegetation for the  
11 Forest, which captures information about Fisher habitat components (“CWHR”). SF\_11, 19, 47a.  
12 Creating a new EVEG layer took many months to generate, with the requisite habitat information.  
13 SF\_1298; ECF No. 29, at 1-2. The Forest Service then provided CBI with this new EVEG layer in  
14 December 2016. SF\_1298. The Forest Service and CBI used the same EVEG layer generated in  
15 December 2016 from images captured in July 2016, which provided the most reliable information  
16 available for project analysis. SF\_8, 9. This information confirmed that during the worst years of  
17 the drought, moderate and high-capability CWHR 2.1 habitat in the Frog project area declined by  
18 only 2 percent. SF\_8.

19 The Forest Service used satellite imagery to determine that any difference in data between  
20 July and October 2016 was very minimal – specifically “less than 1 percent due to mortality.”  
21 SF\_47a (ECF No. 41-4). The District Ecosystem Manager also reviewed the updated vegetation  
22 data and, along with observations of the distribution of mortality in the project area, concluded  
23 that Frog’s prescriptions remained valid. SF\_2, 14–17. The Forest Service found that mortality is  
24 not uniformly distributed—particularly at Frog’s higher elevations—and attempting to use  
25 “rough” mortality rates in Frog’s small, scattered units would be speculative. SF\_9–10, 1260–61.  
26 The Forest Service acknowledged and qualitatively appraised continuing mortality rather than  
27 generate numbers that would be unhelpful at best, and potentially misleading. Id.; Idaho Rivers  
28 United v. U.S. Army Corps of Eng’rs, 2016 WL 498911, at \*17 (W.D. Wash. Feb. 9, 2016)

1 (“NEPA does not require agencies to include speculative information.”).

2 In the SIR, the Forest Service acknowledged that tree mortality will likely continue in  
3 California for at least 1 to 3 years, reducing habitat quality in general. SF\_9. The Forest Service  
4 further acknowledged that vegetation data are not updated systematically and frequently enough to  
5 predict changed habitat for project planning purposes. SF\_1261. However, based on estimated  
6 mortality rates (*e.g.*, SF\_1272, 1274), the Forest Service appraised ongoing mortality qualitatively  
7 at the cumulative-effects scale and found that Frog would not significantly impact or contribute to  
8 a loss of Fisher viability in Core Area 2. SF\_9–10 (“While ongoing tree mortality is likely to  
9 further lower habitat quality, impacts to fisher habitat from this predicted future mortality is  
10 speculative at best. In any event, there is no indication that implementation of the Frog Project  
11 would significantly impact or would contribute to a loss of viability of Fishers at the Fisher Core  
12 Area 2 scale.”) At the project level, Frog is expected to help curb the mortality rates observed at  
13 lower elevations in the project area. SF\_10. The Forest Service also confirmed that “[t]he impact  
14 of further tree mortality on Fisher habitat will continue to be monitored and addressed as  
15 necessary, as more quantifiable information (*i.e.*, new vegetation data) becomes available.” SF\_10;  
16 Wilderness Soc’y v. Salazar, 603 F. Supp. 2d 52, 61–62 (D.D.C. 2009) (“That defendants may  
17 continue to assess impacts as more information becomes available does not indicate that  
18 defendants failed to take a ‘hard look’ at the environmental consequences of its proposed action . .  
19 . . .”); see also N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp., 545 F.3d 1147, 1154 (9th  
20 Cir. 2008) (finding “no fault” with the decision to reevaluate impacts “[o]nce additional  
21 information . . . was available”).

22 While SF Keeper argues that the Forest Service should have used estimated mortality rates  
23 in a more “quantitative” fashion, the Forest Service maintains that such estimates are very  
24 imprecise (*e.g.*, anywhere from 2,000 to 14,000 trees per square mile) and apply indiscriminately  
25 across 6.5 square mile “grid cells.” SF\_1274, 1276. On the other hand, Frog consists of 26 small,  
26 scattered units with less than 1 square mile of fisher habitat combined. SF\_42, 63, 8. Based on the  
27 administrative record, it would be speculative to guess the number and locations of trees that  
28 might die in fisher habitat in or near the project, if any. SF\_9, 10 (noting further that Core Area 2

1 contains “a number of different habitat types at different elevations which are not impacted  
2 equally” by tree mortality). The Forest Service reasonably found this exercise was not useful for  
3 analyzing Frog’s effects on Fishers. SF\_9; Idaho Rivers United, 2016 WL 498911, at \*17 (W.D.  
4 Wash. Feb. 9, 2016) (“NEPA does not require agencies to include speculative information.”); see  
5 also Hapner v. Tidwell, 621 F.3d 1239, 1245 (9th Cir. 2010) (upholding an EA that did not  
6 analyze effects on climate change because the project “involve[d] a relatively small amount of  
7 land [1,100 acres, or 1.7 square miles] and it would thin rather than clear cut trees,” and thus  
8 discussing its possible climate-change effects would be “meaningless”).

9       Such action by Defendants is not arbitrary or capricious. See Vill. of Bensenville v.  
10 F.A.A., 457 F.3d 52, 71 (D.C. Cir. 2006) (holding that the agency’s method of “creating its  
11 models with the best information available when it began its analysis and then checking the  
12 assumptions of those models as new information became available” was reasonable given the  
13 “many months required to conduct full modeling with new data”).

14             iii. Uncertain and Unknown Risks on Fishers

15       SF Keeper argues that neither the SIR nor the Revised Fisher BE address the “highly”  
16 uncertain and unknown risks from the tree die-off and logging activities on the Fishers.

17       NEPA requires agencies to consider “the *degree* to which an action may adversely affect a  
18 . . . species or critical habitat.” Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1012  
19 (9th Cir. 2006) (emphasis in original). “[I]t does not follow that the presence of some negative  
20 effects necessarily rises to the level of demonstrating a significant effect on the environment. We  
21 decline to interpret NEPA as requiring the preparation of an EIS any time that a federal agency  
22 discloses adverse impacts on wildlife species or their habitat or acknowledges information  
23 favorable to a party that would prefer a different outcome. NEPA permits a federal agency to  
24 disclose such impacts without automatically triggering the ‘substantial questions’ threshold.”  
25 Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1240 (9th Cir. 2005).

26       “[T]he regulations do not anticipate the need for an EIS anytime there is some uncertainty,  
27 but only if the effects of the project are ‘highly’ uncertain.” Envtl. Prot. Info. Ctr., 451 F.3d at  
28 1011 (citations omitted); see Native Ecosystems, 428 F.3d at 1240 (“Simply because a challenger

1 can cherry pick information and data out of the administrative record to support its position does  
2 not mean that a project is highly controversial or highly uncertain.”); see also 40 C.F.R. §  
3 1508.27(b)(5).

4 The Ninth Circuit has recognized that there is a “quotient of uncertainty” which is present  
5 in every prediction about the natural world. For example, in Ctr. For Biological Diversity v.  
6 Kempthorne, 588 F.3d 701 (9th Cir. 2009) the Ninth Circuit rejected the argument that a  
7 regulation affecting polar bears was “highly uncertain” because of the species’ increasing  
8 vulnerability from global warming, holding: “Although the specter of climate change made the  
9 Service’s prediction less certain than it would be otherwise, such uncertainty is not ‘high  
10 uncertainty,’ but only that quotient of uncertainty which is always present when making  
11 predictions about the natural world. . . . Again, we grant the Service great deference as it made a  
12 scientific prediction within the scope of its technical expertise. The Service committed no clear  
13 error in deciding not to produce an EIS.” Id. at 712 (citations omitted); Envtl. Prot. Info. Ctr. v.  
14 U.S. Forest Serv., 451 F.3d 1005, 1010 (9th Cir. 2006) (finding that predicted harm to spotted  
15 owls was not so uncertain as to require an EIS where the U.S. Forest Service forecasts were based  
16 on the extrapolation of existing owl nesting data); see also W. Watersheds Project v. Bureau of  
17 Land Mgmt., 552 F. Supp. 2d 1113, 1136 (D. Nev. 2008) (“Although the [Environmental  
18 Assessment] indicates there are difficulties in determining environmental consequences and  
19 making accurate projections of the number of acres impacted, these statements do not show the  
20 effects of the project are highly uncertain. Rather, the statements outline the difficulties in  
21 evaluating the environmental consequences.”).

22 Frog’s remaining work will occur on 1,027 acres, or 0.4 percent of the 213,321 acres in  
23 Core Area 2 of the southwestern tip of the Sierra Nevada and Greenhorn Mountains. SF\_31, 63.  
24 Of those 1,027 acres, about half are in Fisher habitat, or 0.4 percent of the 109,919 acres of  
25 CWHR 2.1 habitat in Core Area 2. SF\_31, 63, 8. In the worst years of the drought, moderate and  
26 high capability CWHR 2.1 habitat declined only 2 percent in the project area. SF\_8. Implementing  
27 Frog will thin canopy by an average of 3 percent (in absolute terms) and thereafter canopy is  
28 projected to recover within a more resilient habitat. SF\_8–10. Frog’s project units are very small



1 compared to a Fisher home range (2,560 acres), such that displacement of an individual is unlikely  
2 even in the short term. SF\_22, 39. See Env'tl. Prot. Info. Ctr., 451 F.3d at 1010 (“NEPA  
3 regulations direct the agency to consider the degree of adverse effect on a species, not the impact  
4 on individuals of that species.”).

5  
6 Additionally, Frog incorporates a number of design features to avoid impacts to Fishers  
7 during and after implementation. SF\_17; F\_219, 262, 274, 295-96, 304, 309, 336, 623. Frog’s  
8 treatments are also “well understood and are not so uncertain or unknown as to present potentially  
9 significant effects.” SF\_1261; In Def. of Animals v. U.S. Dep’t of Interior, 751 F.3d 1054, 1073  
10 (9th Cir. 2014) (holding that a roundup of almost 2,000 wild horses and burros, while  
11 “unprecedented in scope,” was not “highly uncertain” because the effects of roundups were “well  
12 known” to the agency). The Forest Service and its experts recognize the dramatic extent of tree  
13 mortality across the landscape, as well as uncertainty about how Fisher population processes writ  
14 large might respond over time. SF\_9–10, 54. Core Area 2 covers a “wide geographic area” that  
15 was not uniformly affected by tree mortality. SF\_1260, 1328.

16 While there have been changes in the landscape, the Forest Service’s Fisher experts have  
17 determined that “increasing the resilience of the remaining patches of large living conifers will be  
18 important to providing for the long-term persistence of the Fisher population.” SF\_54. Defendants  
19 maintain that this is the purpose of Frog. SF\_10 (“Implementation of treatments in the Frog  
20 Project is expected to help curb the rate of mortality in the project area.”); SF\_21 (finding “the risk  
21 of taking no action to be a greater threat to Fisher[s] and their habitat than a series of modeled fuel  
22 reduction projects with activities similar to the Frog Project”).

23 The Ninth Circuit has held that “where the Forest Service has determined that stand  
24 treatments are clearly needed to reduce risks [and] will clearly result in greater assurance of long  
25 term maintenance of habitat, . . . we should be loathe to second guess their efforts.” League of  
26 Wilderness Defs. v. Allen, 615 F.3d 1122, 1134 (9th Cir. 2010); see also Sequoia ForestKeeper,  
27 2016 WL 5235118, at \*9 (holding that “differences in opinion on the values of mutually  
28 recognized long and short term goals and risks . . . is not proper subject matter for determination

1 by a district court in an action under NEPA”). The Court finds that the Forest Service has not  
2 acted arbitrarily or capriciously.

3 iv. New Conservation Measures and Connectivity Concerns Due to Cedar Fire

4 SF Keeper argues that due to the massive tree die-off, Defendants should have, but failed  
5 to (1) consider the new “conservation measures” and (2) analyze the effects on several key Fisher  
6 “habitat characteristics” stressed in *Changed Circumstances and Implementation of the Southern*  
7 *Sierra Fisher Conservation Strategy Notes from the Authors' March 2017*. Pl’s Mtn at 22. SF  
8 Keeper asserts that the Forest Service’s analysis of habitat in the project area “cannot be  
9 considered” a “‘stand-scale’ analysis.” Further, SF Keeper argues that Defendants have failed to  
10 consider potentially significant effects on Fisher habitat after the Cedar Fire, which burned  
11 adjacent to the Frog Project area.

12 As to conservation measures for connectivity, the Forest Service found that Frog’s  
13 treatments would not cause barriers to movement across the Fisher home ranges (or “cells”)  
14 overlapping the project area. SF\_27 (citing Table 5 at SF\_28 and Map 2 at SF\_43). Connectivity  
15 between home ranges “will be maintained throughout the implementation of [Frog] by design  
16 criteria . . . including riparian zones and no treatments areas. The inclusion of untreated areas  
17 along steep sloped regions and riparian corridors will maintain habitat connectivity and fisher  
18 dispersal routes both within and outside of the Frog Project area.” SF\_28 (noting further that  
19 “[t]he Frog Project will use existing timber landings to minimize disruption of the vegetative  
20 covers used for dispersal of Fisher[s]. Dense cover is also retained along stream corridors and  
21 other features outside of the units”).

22 Frog’s Environmental Assessment found that “[h]abitat adjacent to the Frog Project has  
23 been severely fragmented and isolated by past large fires.” F\_190, 213–14. The Forest Service  
24 found that implementing Frog is itself a means of protecting home-range connectivity “from  
25 uncharacteristically severe fire and not contribut[ing] to further fragmentation.” SF\_27–28.  
26 Accordingly, potential fragmentation near Frog does not “show a ‘seriously different picture of the  
27 likely environmental harms stemming from the proposed project.’” Tri-Valley CAREs v. U.S.  
28 Dep’t of Energy, 671 F.3d 1113, 1130 (9th Cir. 2012).

1 Further, the Forest Service did conduct some analysis pursuant to their own methods on the  
2 “stand level.” See SF\_ 20, 57–58 (SF\_57 describes “stand level” as “represent[ing] the availability  
3 of individual habitat features within the project area”). The Forest Service identified and assessed  
4 Frog’s effects on fisher habitat characteristics in the project area. These include canopy closure as  
5 well as other fisher habitat components in the CWHR classification system, such as tree types  
6 (e.g., Montane Hardwood Conifer [“MHC”] and Sierran Mixed Conifer [“SMC”]) and tree size  
7 (e.g., trees measuring 11 to 24 inches dbh [Class “4”] and greater than 24 inches dbh [Class “5”]).  
8 See SF\_22–25. Tree size and canopy correlate with basal area (SF\_17), and project design criteria  
9 further call for the retention of habitat components such as hardwoods greater than or equal to 12  
10 inches dbh, snags greater than 15 inches dbh, and 180 square feet basal area per acre. SF\_17;  
11 F\_219.

12 The Forest Service also weighed Frog’s costs and benefits, sharing CBI’s view that “short-  
13 term risk may be necessary to meet longer term conservation and resiliency objectives.” SF\_58.  
14 The Forest Service acknowledged, for example, that Frog may result in a slight, short-term drop in  
15 canopy and that individual fishers may leave units during thinning. SF\_25–26. The Forest Service  
16 also confirmed that Frog will maintain overall habitat suitability and prohibit thinning during the  
17 fisher birthing and rearing season. SF\_26, 34. Ultimately, Defendants determined that Frog  
18 “would result in only limited habitat disturbance” while providing long-term habitat resilience  
19 against fire, drought, and insects. SF\_26, 34 (confirming Frog will “improve fisher habitat  
20 resiliency while retaining key fisher habitat characteristics”).

21 The Forest Service compared vegetation levels before and after the Cedar Fire to identify  
22 areas of habitat change at or above 50 percent. SF\_11, 47a (ECF No. 41-4). The Forest Service  
23 then excluded these areas from calculations of CWHR 2.1 and high-value reproductive habitat.  
24 SF\_11, 47a (ECF No. 41-4). Using this approach, the Forest Service found that the Cedar Fire  
25 “resulted in a loss of about two percent of the CWHR 2.1 habitat and two percent of the CBI  
26 [high-value reproductive] habitat available to the southern Sierra fisher sub-population. Within  
27 just fisher Core Area 2, this represents a loss of less than five percent of both CWHR 2.1 and CBI  
28 habitat.” SF\_10.

1 The Forest Service further determined that “[t]he effects of this fire alone are not likely to  
2 threaten the viability of the sub-population, but the changes in vegetation caused by the Cedar fire  
3 have isolated the fisher population in the southern Greenhorn Mountains.” SF\_10. Consequently,  
4 “Fishers south of the Cedar Fire area may be at greater risk in the long-term due to this isolation.”  
5 SF\_10. Unlike the Rancheria project, however, Frog sits north of the Cedar Fire and is still  
6 connected with the Core Area 2 of the Sierra fisher sub-population. SF\_46–47; see also SIR—  
7 Rancheria Project (ECF No. 42-1), at 10 (“Fishers south of the Cedar fire, including the Rancheria  
8 project area[,] may be at greater risk . . . due to this isolation.”). Defendants have determined that  
9 Frog’s implementation would not render currently suitable habitat unsuitable, and thus would not  
10 create breaks in habitat across fisher home ranges overlapping the project area. SF\_9 (finding that  
11 the “minor changes [from Frog’s implementation] would not significantly alter the availability or  
12 configuration of fisher habitat at the home range” or “threaten connectivity”).

13 Frog’s Environmental Assessment noted that the project could temporarily displace  
14 individual Fishers during treatment, although such displacement was unlikely. F\_225. The  
15 Environmental Assessment also found that displacement was unlikely to result in individual  
16 mortality “with areas of adjacent suitable habitat.” F\_197. After the Cedar Fire, Frog remains  
17 connected to Core Area 2, and Frog’s possible displacement effects are not “significantly  
18 different” than previously considered. See Idaho Wool Growers Ass’n v. Vilsack, 816 F.3d 1095,  
19 1107 (9th Cir. 2016). SF\_10, 46–47; cf. ECF No. 42-1, at 10 (Rancheria project area).

20 The Court finds that Defendants have not acted arbitrarily or capriciously in regards to new  
21 conservation measures and potential connectivity concerns based on the Cedar Fire.

22 v. Stand Exam Data

23 SF Keeper argues that in light of tree mortality and vegetation changes, Defendants should  
24 have gathered and analyzed new stand exam data (*i.e.*, physical inspections of each of the project  
25 units containing the 1,027 acres remaining in Frog) to ensure that the Frog Project can still meet  
26 silvicultural goals.

27 The National Forests “have never been, and will never be, static”—“new information and  
28 changed circumstances are the norm.” SF\_1329. The Forest Service is correct that it need not

1 conduct new stand exams whenever changes occur in the project area, and “[t]o require otherwise  
2 would render agency decisionmaking intractable.” Marsh, 490 U.S. at 373; see SF\_1329  
3 (explaining that the forest is dynamic, and tree mortality is one of the challenges to forest  
4 management).

5 The Forest Service found that during the years between the 2010 stand exams and July  
6 2016 (*i.e.*, the worst years of the drought), moderate and high-capability CWHR 2.1 habitat in the  
7 project area declined by only 2 percent, and thus determined that new stand exams were  
8 unnecessary. SF\_47a, 8; see also SF\_2 (confirming that silvicultural prescriptions are still valid).  
9 CWHR 2.1 includes habitat components such as tree species, size, and canopy density, which  
10 correlate with other habitat characteristics such as basal area. F\_274, 102; SF\_17. The Forest  
11 Service also used satellite imagery to confirm that any difference in data between July and  
12 October 2016 was minimal. SF\_47a (ECF No. 41-4).

13 According to the Ecosystem Manager and the Fuels Officer for the Western Divide Ranger  
14 District, “[t]he Frog Project is treating fir stands between 6,500 and 8,000 feet in elevation, where  
15 mortality levels are much lower and the proposed treatments are expected to lower the competitive  
16 stress on individual trees and lessen future mortality.” SF\_16 (Frog Project Silvicultural Review  
17 dated April 3, 2017); accord SF\_14 (Revised Frog Project Fuels Review dated April 3, 2017). This  
18 is consistent with observations of the Regional Forester in August 2016: “Tree mortality has not  
19 been uniform across the Sierra Nevada, such that the approaches we use may vary by locale.”  
20 SF\_1328; see also SF\_10 (“Core Area 2 covers a wide geographic area, encompassing a number  
21 of different habitat types at different elevations which are not impacted equally by the current  
22 mortality event.”). Under these circumstances, the Forest Service’s decision to rely on updated  
23 EVEG and CWHR habitat and field observations of its own experts rather than conduct another  
24 round of stand exams for the entire project was not arbitrary or capricious. Lands Council v.  
25 McNair, 629 F.3d 1070, 1074 (9th Cir. 2010) (“[A]n agency must have discretion to rely on the  
26 reasonable opinions of its own qualified experts.”); Sequoia ForestKeeper v. La Price, No. 16-759,  
27 2016 WL 5235118, at \*8 (E.D. Cal. Sept. 22, 2016) (holding that the Forest Service’s “reliance on  
28 [its] own observation of evidence of Fisher use of forest areas that have been previously treated is

1 not an abuse of discretion”); see also Vill. of Bensenville, 457 F.3d at 72 (“[J]udgments regarding  
2 the development of the baseline against which alternatives would be assessed are the sorts of  
3 expert analytical judgments to which courts typically defer.”).

4 The District Ecosystem Manager also reviewed the updated vegetation data and, along  
5 with observations of the distribution of mortality in the project area, concluded that Frog’s  
6 prescriptions remained valid. SF\_2, 14–17. This satisfies NEPA. See Tri-Valley CAREs, 671  
7 F.3d at 1130 (“Because the [agency] determined in its supplemental report that the [new  
8 information] did not show a ‘seriously different picture of the likely environmental harms  
9 stemming from the proposed project,’ we must defer to the [agency’s] finding that a supplemental  
10 [Revised Environmental Assessment] was not required.”).

11 The Court finds that Defendants have not acted arbitrarily or capriciously in declining to  
12 collect new stand data and instead relying on other sources of data.

13 b. Whether the Forest Service Failed to Make an Informed Decision and Failed to  
14 Disclose the Underlying Data

15 SF Keeper argues that “[t]he SIR, Revised Fisher BE, and Silvicultural Review make  
16 generalized conclusory assertions without providing underlying data to support those assertions.  
17 The determination not to supplement the 2013 NEPA analysis fails to identify methodologies, fails  
18 to present the hard data it relies upon, and fails to ensure the scientific accuracy and integrity of  
19 the analysis.” Pl’s Mtn at 27.

20 This claim rehashes arguments raised elsewhere in SF Keeper’s motion and already  
21 addressed in various sections of this order. A SIR is a procedure that merely documents the  
22 agency’s “hard look” at new information. Friends of the Clearwater v. Dombeck,  
23 222 F.3d 552, 561 (9th Cir. 2000); Laguna Greenbelt, 42 F.3d at 529; Price Rd. Neighborhood,  
24 113 F.3d at 1510 (“If reevaluation reveals that an [Environmental Assessment/FONSI] remains  
25 valid, no additional documentation is required.”). The Forest Service’s SIR and its supporting  
26 materials satisfy this purpose, and the underlying data were disclosed and available to SF Keeper.  
27 See, e.g., ECF No. 35, at 1 (confirming SF Keeper’s receipt of the geographic-information-system  
28 data supporting CBI’s review and analysis of updated vegetation information); ECF No. 41-3, at 2

1 (making available-upon-request the “Forest Vegetation Simulator (FVS) data produced [in]  
2 December 2016 reflecting vegetation gathered as of July 2016”).

3 The Court concludes that Defendants have not acted arbitrarily or capriciously in making  
4 an informed decision based on the data. See Friends of the Clearwater, 222 F.3d at 561 (“An  
5 agency need only articulate a rational connection between the facts it has found and its  
6 conclusions. The Forest Service has done so here, and even were we to disagree with its  
7 conclusion, we could not substitute our judgment for that of the agency.”) (citation omitted).

8 c. Whether the Forest Service Failed to Consider and Analyze Reasonably  
9 Foreseeable Future Actions That Cause Cumulative Effects

10 SF Keeper argues that “[t]he Forest Service has failed to consider and properly analyze the  
11 reasonably foreseeable future actions and cumulative effects from the Spear Creek Roadside  
12 Hazard Tree Mitigation Project (“Spear Creek Project”), in its cumulative effects analysis.” Pl’s  
13 Mtn at 28.

14 After the Forest Service approved Frog in 2013, CBI published the 2016 Fisher Strategy  
15 and issued guidance for analyzing cumulative disturbance from a proposed project combined with  
16 other mechanical thinning projects. SF\_3–4. As documented in the SIR, Defendants applied this  
17 approach to determine whether Frog, at the cumulative-effects scale, would affect Fishers “in a  
18 significant manner or to a significant extent not already considered.” Marsh, 490 U.S. at 374.  
19 The Forest Service found that it would not. SF\_33–39.

20 The Spear Creek Project did not have specific acreage or prescriptions when the SIR was  
21 prepared. SF\_11. Nevertheless, the Forest Service found that including the Spear Creek Project at  
22 the home-range scale was unnecessary because it will not overlap with hexagons affected by the  
23 Frog Project and thus “will not contribute to the 13% Conservation Strategy guideline threshold  
24 for mechanical treatments.” SF\_11. The Spear Creek Project, moreover, “would primarily fell  
25 hazard trees along roads, which are considered lower quality habitat for fishers, [and] therefore  
26 impacts at the fisher core area scale are expected to not be significant.” SF\_11, 37. Fishers already  
27 avoid areas near roads, and Defendants maintain that such behavior should be encouraged. F\_278  
28 (reporting that vehicle collisions are a primary cause of Fisher mortality).

1 As acknowledged by Defendants, projects need not be final to be foreseeable in a  
2 cumulative-effects analysis. But “[t]he Forest Service need not always consider ‘all proposed  
3 actions in an appropriate region before approving any of the projects.’” Selkirk Conservation All.  
4 v. Forsgren, 336 F.3d 944, 960 (9th Cir. 2003). As long as the Forest Service “provide[s] support”  
5 and “justif[ies]” the scope of its cumulative effects analysis, that decision is entitled to deference.  
6 Id. at 959–60 (upholding the Forest Service’s exclusion of a road-building project from a  
7 cumulative-effects analysis because the agency “acknowledged the existence of [the project] and  
8 stated why the project should not be included”); Neighbors of Cuddy Mtn. v. Alexander, 303 F.3d  
9 1059, 1071 (9th Cir. 2002) (“[U]nder NEPA we defer to an agency’s determination of the scope of  
10 its cumulative effects review.”).

11 Here, the Forest Service acknowledged the existence of the Spear Creek Project and  
12 explained that the Spear Creek Project was outside the scope of cumulative disturbance at issue:  
13 the hexagons in Core Area 2 that overlap the Frog project. SF\_5. Thus, under CBI’s guidance,  
14 Defendants have determined that mechanical thinning in the Spear Creek Project could not  
15 possibly contribute to disturbance within Frog, see SF\_11, and the Forest Service need not  
16 perform analysis that will not make a difference. Ecology Ctr. v. Castaneda, 574 F.3d 652, 667  
17 (9th Cir. 2009) (“The Forest Service need not catalogue events that are not ‘truly significant to the  
18 action in question.’”) (citation omitted); Selkirk, 336 F.3d at 960 (“It was not unreasonable for the  
19 Forest Service to limit its analysis to the [Bear Management Unit] in which the Stimson Project  
20 would take place.”); Friends of the Wild Swan v. Weber, 767 F.3d 936, 943–44 (9th Cir. 2014)  
21 (upholding a cumulative-effects analysis that “considered the total effects on lynx analysis units  
22 touched by the project”—“[a]lthough [plaintiff] argues the agency should have also considered  
23 effects from the neighboring project because the lands are adjacent, the agency has to draw a line  
24 somewhere and has offered a reasonable justification for why it drew the line where it did”).

25 Moreover, Defendants state that the Spear Creek Project will receive its own separate  
26 environmental review, including consideration of cumulative effects, and need not be analyzed at  
27 this juncture. Second Voss Decl. (ECF No. 47-3) Ex. D, at 3; Idaho Sporting Cong. v. Thomas,  
28 137 F.3d 1146, 1152 (9th Cir. 1998) (“Since the effects of the two sales were accounted for in the



1 West Camas Creek cumulative impacts analysis, we do not require duplication in the Miners  
2 Creek [Environmental Assessment].”).

3 The Court finds that Defendants have not acted arbitrarily or capriciously in regards to  
4 their decisions regarding consideration of the Spear Creek Project in connection with the Frog  
5 Project.

6 d. Whether the Forest Service Failed to Consider the Significance of its Action in  
7 Light of Uncertain and Unknown Risks to the Fisher

8 SF Keeper argues that it has met the “low standard” necessary and need not show that  
9 “significant effects will in fact occur” because there are “substantial questions” whether the Frog  
10 Project may have a significant effect on the dwindling Fisher population, in light of the Forest  
11 Service’s alleged failures to back up its determinations with sufficient data and analysis, and the  
12 alleged highly uncertain and unknown risks from mortality and from logging under these  
13 circumstances. Pl’s Mtn at 30-31. SF Keeper argues that Defendants must at least prepare a  
14 supplemental Environmental Assessment to make a determination as to whether they must  
15 consider preparing an EIS.

16 “Supplementation is not required where the agency, having taken a ‘hard look’ at  
17 reevaluation, ‘determines that the new impacts will not be . . . significantly different from those  
18 already considered.’” Idaho Wool Growers, 816 F.3d at 1107. Whether supplementation is  
19 required “is a classic example of a factual dispute the resolution of which implicates substantial  
20 agency expertise.” Marsh, 490 U.S. at 376. And Courts “must be at [their] most deferential when  
21 reviewing scientific judgments and technical analyses within the agency’s expertise.” Lands  
22 Council, 629 F.3d at 1074.

23 Defendants point out that uncertainty over recent tree mortality and its effects on the  
24 Fisher population would exist regardless of Frog. The administrative record does not demonstrate  
25 that the effects of the Frog project are “highly uncertain,” which is the relevant NEPA inquiry. 40  
26 C.F.R. § 1508.27(b)(5); Conservation Cong. v. U.S. Forest Serv., 2017 WL 661959, at \*8 (E.D.  
27 Cal. Feb. 17, 2017) (“Plaintiff does not tailor its argument to the context of the Project at issue,”  
28 *i.e.*, “the degree that this Project’s possible effects on the human environment are highly

1 uncertain.”). CBI confirmed that “increasing the resilience of the remaining patches of large living  
2 conifers will be important to providing for the long term persistence of the Fisher population,” and  
3 the Forest Service reasonably found “no indication” that Frog “would significantly impact or  
4 would contribute to a loss of viability of Fishers.” SF\_54, 9–10.

5 Further, while SF Keeper aggregates all proposed projects in Core Area 2 to bolster its  
6 claims of uncertainty and significance, this is not persuasive in light of the administrative record.  
7 See SF\_11 (“The cumulative effects of proposed vegetation management projects in Fisher Core  
8 Area 2 would impact 4% or less of the available Fisher habitat. . . . [T]here is no indication in  
9 space or time of cumulative impacts that would have a significant effect on the viability of the  
10 Fisher within the core area, with the exception of . . . large-scale, stand replacing wildfire.”). The  
11 Forest Service has and continues to address the potential cumulative effects of proposed projects  
12 in light of new information and circumstances, as appropriate. See, e.g., FAC (ECF No. 46) ¶¶ 33  
13 (cancelling White River, Saddle, and Ice Helicopter); ECF No. 42-1 (determining that Rancheria  
14 needs supplemental NEPA review); Sequoia ForestKeeper v. Watson, E.D. Cal. Case No. 16-  
15 1865, ECF No. 17, at 2 (reducing the scale of Summit and modifying its prescriptions). This  
16 fulfills NEPA.

17 The Regional Forester explained that “tree mortality has not been uniform across the Sierra  
18 Nevada, such that the approaches we use may vary by locale.” SF\_1328. The Regional Forester  
19 continued:

20 A great deal of scientific literature and professional expertise indicates that  
21 active forest management . . . is necessary to minimize the extent of drought and  
22 beetle-induced tree mortality and also to mitigate the adverse impacts  
23 from mortality that [have] already occurred. Such active management is  
24 essential to restore forests that can provide wildlife habitat and other ecological  
25 benefits, meet the needs of the American public, and be resilient to climate  
26 change. . . . Given the serious risks associated with inaction and lack of forest  
27 management, we must simultaneously study and manage the land.  
28 . . . [I]t is important to remember that the forests of the Sierra Nevada are  
dynamic systems, influenced by climate and disturbance agents such as fire and  
insects. These forests have never been, and will never be, static. . . . [N]ew  
information and changed circumstances are the norm and should not be viewed as  
a basis for halting land management in the Sierra Nevada.

SF\_1329.

The Court finds that Defendants have not acted arbitrarily or capriciously in considering

1 the impact of the Frog Project on the Fisher.

2 e. Whether the Forest Service Improperly Used its SIR and the Revised Fisher BE

3 SF Keeper argues that at the very least, Defendants must prepare a revised Environmental  
4 Assessment for the Frog Project. SF Keeper argues that Defendants improperly used the SIR and  
5 Revised Fisher BE to supplement, revise, and repair deficiencies in the Frog Project  
6 Environmental Assessment prepared in 2013. SF Keeper also takes issue with minor adjustments  
7 in project implementation noted in the Frog Project Fuels Review.

8 The NEPA Forest Service Handbook 1909.15 § 18.1 (HBAR 4610) describes the function  
9 of a SIR:

10 If new information or changed circumstances relating to the environmental impacts  
11 of a proposed action come to the attention of the responsible official after a  
12 decision has been made and prior to completion of the approved program or  
13 project, the responsible official should review the information carefully to  
14 determine its importance.

15 If, after an interdisciplinary review and consideration of new information within the  
16 context of the overall program or project, the responsible official determines that a  
17 correction, supplement, or revision to an environmental document is not necessary,  
18 implementation should continue.

19 [The agency shall] [d]ocument the result of the interdisciplinary review in the  
20 appropriate program or project file. This documentation is sometimes called a  
21 supplemental information report (SIR) and should conclude with whether or not a  
22 correction, supplement, or revision is needed, and if not, the reasons why.

23 Klamath Siskiyou Wildlands Ctr. v. U.S. Forest Serv., 52 F. Supp. 3d 1089, 1096 (E.D. Cal. 2014)

24 Courts repeatedly endorse SIRs as a method for analyzing new circumstances and  
25 determining whether they reveal significant new impacts requiring formal NEPA review. See  
26 Friends of the Clearwater, 222 F.3d at 561 (upholding the Forest Service’s preparation of “a new  
27 SIR, several Biological Assessments and Biological Evaluations, and other documents, all of  
28 which contain additional data and analyses supporting the Forest Service’s conclusion” that new  
circumstances and information did not warrant supplemental NEPA review); see also Price Rd.  
Neighborhood, 113 F.3d at 1510 (“[W]hether a supplemental [Environmental Assessment] is  
required depends on the significance of the new impacts.”). Such procedures allow the agency to  
document that it “carefully considered the information, evaluated its impact, and supported its

1 decision not to supplement.” Animal Def. Council, 840 F.2d at 1439.

2 The Forest Service formatted its updated analyses to correspond with the original  
3 organization presented in the 2013 Environmental Assessment—e.g., “Revisions to Frog Project  
4 Fisher Biological Evaluation,” “Revised Frog Project Fuels Review,” and “Updated Cumulative  
5 Effects.” This labeling convention does not violate NEPA.

6 NEPA prohibits an agency from using a SIR to analyze information the agency “knew or  
7 should have known . . . at the time it prepared the original [Environmental Assessment.]” Idaho  
8 Sporting Cong., 222 F.3d at 567. Here, the information analyzed in the SIR and its supporting  
9 materials was new and unknown at the time of the Environmental Assessment, and thus the SIR  
10 was appropriate. Id. at 566 n.3. “To require more would task the agencies with a sisyphian feat of  
11 forever starting over in their environmental evaluations.” Price Rd. Neighborhood, 113 F.3d 1505  
12 at 1510.

13 Further, as for the minor adjustments noted in the Frog Project Fuels Review (SF\_2–3, 14–  
14 15), these adjustments are not “substantial changes in the proposed action” requiring a  
15 supplemental NEPA process. 40 C.F.R. § 1502.9(c)(1)(i); Price Rd. Neighborhood, 113 F.3d at  
16 1509 (“[A]n agency need not start the environmental assessment process anew with every change  
17 in a project.”). As the Forest Service explained, these adjustments will reduce the possibility of  
18 adverse effects. SF\_15 (explaining that adjustments would “prevent undesirable levels of mortality  
19 or injury to desirable residual trees”).

20 The Court finds that Defendants have not acted arbitrarily or capriciously in deciding to  
21 prepare a SIR in this case.

22 ***B. Whether the Frog Project Violates NFMA***

23 The NFMA and its implementing regulations provide for forest planning and management  
24 by the Forest Service on two levels: (1) forest level and (2) individual project level. See generally  
25 16 U.S.C. § 1604; see also Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 729–30 (1998). “On  
26 the forest level, the Forest Service develops a Land and Resource Management Plan (forest plan),  
27 which consists of broad, long-term plans and objectives for the entire forest. Forest plans are  
28 designed to manage forest resources by balancing the consideration of environmental and

1 economic factors.” Native Ecosystems Council, 697 F.3d at 1056 (citation omitted). The  
2 NFMA's purpose is to require that the Forest Service “provide for diversity of plant and animal  
3 communities” in managing national forests. 16 U.S.C. § 1604(g)(3)(B).242526

4 “After a forest plan is approved, the Forest Service implements the forest plan when  
5 approving or denying site-specific projects. Site specific actions may include resource plans,  
6 permits, contracts, and other instruments for occupancy or use of forest lands.” Native Ecosystems  
7 Council, 697 F.3d at 1056 (citing to Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88  
8 F.3d 754, 757 (9th Cir.1996)). “While NFMA requires that the proposed site-specific actions be  
9 consistent with the governing Forest Plan, the Forest Service's interpretation and implementation  
10 of its own forest plan is entitled to substantial deference. The Forest Service's failure to comply  
11 with the provisions of a Forest Plan is a violation of the NFMA.” Native Ecosystems Council, 697  
12 F.3d at 1056.

13 “Agency decisions challenged under the NFMA may be set aside only if they are arbitrary,  
14 capricious, an abuse of discretion, or otherwise not in accordance with the law. In determining  
15 whether a decision is arbitrary or capricious, we ‘must consider whether the decision was based on  
16 a consideration of the relevant factors and whether there has been a clear error of judgment.’” Id.  
17 (citations omitted).

18 SF Keeper argues that the Frog Project analysis fails to comply with the Sequoia Forest  
19 Plan Standard that allows no more than 30 percent canopy cover reduction within each treatment  
20 unit. Though the SIR shows canopy changes across all project units and watersheds, SF Keeper  
21 asserts the Forest Service must show reductions on a unit-by-unit basis.

22 SIR is not a project approval document, and it need not detail how a project complies with  
23 each and every component of the relevant forest plan. 36 C.F.R. § 219.15(d); see Klamath  
24 Siskiyou Wildlands Ctr. v. U.S. Forest Serv., 52 F. Supp. 3d 1089, 1096–97 (E.D. Cal. 2014)  
25 (discussing SIRs). The SIR and its supporting materials confirm Frog was designed pursuant to  
26 the 2004 Plan Amendment, including “provisions for maintenance of canopy closure.” SF\_36.  
27 These materials show that reduction in canopy closure across Frog’s units will be far less than 30  
28 percent (in absolute terms) in high-value reproductive Fisher habitat, (*i.e.*, CBI habitat, or CWHR

1 size and density classes 4D, 5M, 5D, and 6). SF\_21, 47a (ECF No. 41-4), 57. Frog’s design  
2 features also ensure that canopy closure will not fall below 40 percent. SF\_17. See Native  
3 Ecosystems Council, 697 F.3d at 1056 (“[T]he Forest Service’s interpretation and implementation  
4 of its own forest plan is entitled to substantial deference.”).

5 The Court finds that Defendants have not acted arbitrarily and capriciously in regards to  
6 the forest plan and therefore Defendants have not violated the NFMA.

7 ***C. SF Keeper’s Request for Vacatur***

8 SF Keeper has not met its burden of proving that vacatur is warranted in this case. Such  
9 relief has the effect of an injunction, and SF Keeper therefore “must establish”—with a “clear  
10 showing”—that it is entitled to such extraordinary relief. Winter v. Nat. Res. Def. Council, Inc.,  
11 555 U.S. 7, 20, 22 (2008). SF Keeper has failed to make the required clear showing and the Court  
12 has found that Defendants did not act arbitrarily or capriciously. Here, SF Keeper asserts that its  
13 averred harms to its members’ interests and the Fisher from logging generally “are permanent,”  
14 whereas the only harm from an injunction “is delay.” Pl.’s Opp. 23:26. In light of the evidence in  
15 the administrative record, this Court disagrees with SF Keeper’s assessment. The Forest Service  
16 has determined that current fuel loads in the project area “pose a high risk of catastrophic loss of  
17 property, natural resources[,] and possibly even life.” SF\_21; see Sierra Nev. Forest Prot.  
18 Campaign v. Rey, 573 F. Supp. 2d 1316, 1338 (E.D. Cal. 2008) (“[R]ecent fire seasons illustrate  
19 the risks from inaction as the number and severity of acres burned in wildfires continues to  
20 increase, with tragic losses to communities, their people and resources, as well as to wildland  
21 firefighters.”). By implementing Frog, “surface fuels would decrease 40–80%, thereby limiting the  
22 size and severity of wildfires in the project area.” SF\_21; see also F\_9 (McNally Fire, 150,000  
23 acres), SF\_10 (Cedar Fire, 29,000 acres). In turn, Frog will also promote the longevity of Fisher  
24 and other wildlife, as “[t]he greatest risk of habitat loss comes from fire.” SF\_16; F\_227  
25 (concluding that “large scale, stand replacing wildfires would most likely cause serious significant  
26 impacts to the [Fisher] population”).

27 In addition, Frog is also designed to generally improve the health and resilience of trees in  
28 the project area, making them less susceptible to mortality from drought and insect attacks in the

1 future. SF\_15, 19; Sierra Forest Legacy, 951 F. Supp. 2d at 1115 (finding that “[e]njoining . . .  
2 vegetation management work . . . will have a negative impact on the Forest Service’s ability to  
3 address the intertwined threats posed by climate change, drought and bark beetles, and is thus  
4 contrary to the public interest”). This objective is all the more pressing in the wake of recent tree  
5 mortality. SF\_10 (concluding that “continuing tree mortality reinforces the need for forested  
6 stands that are resilient” and Frog will “help curb the rate of mortality in the project area”). SF  
7 Keeper has not met its burden for injunctive relief. The Court therefore denies SF Keeper’s  
8 request for vacatur.

9  
10 **II. MOTION TO ADMIT EXTRA-RECORD EVIDENCE AND MOTIONS TO**  
11 **STRIKE**

12 **A. *Evidentiary Motions***

13 On May 12, 2017, SF Keeper filed a motion to admit extra-record evidence (“Motion for  
14 Extra-Record Evidence”) along with SF Keeper’s motion for summary judgment. On May 26,  
15 2017, Defendants filed a motion to strike SF Keeper’s extra-record evidence, or in the alternative,  
16 to supplement the record with the declaration of Jeffrey R. Cordes. In return, on June 8, 2017, SF  
17 Keeper filed a motion to strike the declaration of Jeffrey R. Cordes.

18 **B. *Standard for Admitting Extra-Record Evidence***

19 The judicial review provision of the APA requires consideration of “the whole record or  
20 those parts of it cited by a party.” 5 U.S.C. § 706. “[T]he focal point for judicial review should be  
21 the administrative record already in existence, not some new record made initially in the reviewing  
22 court.” Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985); see also San Luis & Delta-  
23 Mendota Water Auth., 776 F.3d at 992 (“In general, a court reviewing agency action under the  
24 APA must limit its review to the administrative record.”) (citation omitted); Fence Creek Cattle  
25 Co. v. U.S. Forest Serv., 602 F.3d 1125, 1131 (9th Cir. 2010) (“Generally, judicial review of an  
26 agency decision is limited to the administrative record on which the agency based the challenged  
27 decision.”) “This rule ensures that the reviewing court affords sufficient deference to the agency's  
28 action.” San Luis & Delta-Mendota Water Auth., 776 F.3d at 992. “When a reviewing court

1 considers evidence that was not before the agency, it inevitably leads the reviewing court to  
2 substitute its judgment for that of the agency.” Id. (citation omitted).

3 However, the Ninth Circuit has recognized certain exceptions to this rule. “[A] reviewing  
4 court may consider extra-record evidence where admission of that evidence (1) is necessary to  
5 determine whether the agency has considered all relevant factors and has explained its decision,  
6 (2) is necessary to determine whether the agency has relied on documents not in the record, (3)  
7 when supplementing the record is necessary to explain technical terms or complex subject matter,  
8 or (4) when plaintiffs make a showing of agency bad faith.” Id. (citations and internal quotations  
9 omitted).

10 “These exceptions are to be narrowly construed, and the party seeking to admit extra-  
11 record evidence initially bears the burden of demonstrating that a relevant exception applies.” Id.  
12 at 992-93 (citation omitted). “The scope of these exceptions permitted by our precedent is  
13 constrained, so that the exception does not undermine the general rule. Were the federal courts  
14 routinely or liberally to admit new evidence when reviewing agency decisions, it would be  
15 obvious that the federal courts would be proceeding, in effect, *de novo* rather than with the proper  
16 deference to agency processes, expertise, and decision-making.” Lands Council v. Powell, 395  
17 F.3d 1019, 1030 (9th Cir. 2005) “Even if a reviewing court properly admits extra-record evidence  
18 under [these exceptions], it may not *use* the admitted extra-record evidence to determine the  
19 correctness or wisdom of the agency’s decision. Such use is never permitted.” San Luis & Delta-  
20 Mendota Water Auth., 776 F.3d at 993 (emphasis in original, citation omitted).

21 **C. SF Keeper’s Motion for Extra-Record Evidence**

22 SF Keeper seeks to admit extra-record evidence in the form of two declarations: 1) the  
23 Second Declaration of Dr. Chad Hanson (2nd Dr. Hanson Dec.) dated May 12, 2017; and 2) the  
24 Second Declaration of Alison Sheehey (2nd Sheehey Dec.) dated May 12, 2017 (collectively  
25 “New Declarations”). SF Keeper asks the Court to make an exception to the general rule limiting  
26 review to the administrative record, arguing that the New Declarations are necessary “(1) for the  
27 Court to determine whether the Forest Service considered the ‘relevant factors’ before authorizing  
28 its Frog Project determination not to supplement its NEPA analysis; (2) to explain complex



1 subject matter; and (3) under NEPA, because the Forest Service’s analysis insufficiently disclosed  
2 environmental effects and has ‘otherwise swept stubborn problems or serious criticisms under the  
3 rug.’” Pl’s Mtn Evid at 5.

4 The Court finds that SF Keeper has not met its burden of demonstrating that a relevant  
5 exception applies to allow admission of SF Keeper’s extra-record evidence. First, SF Keeper’s  
6 New Declarations are not necessary for the Court to determine whether the Forest Service  
7 considered the ‘relevant factors’ before authorizing its Frog Project determination not to  
8 supplement its NEPA analysis. “The ‘relevant factors’ exception only applies where  
9 supplementing the record is necessary. Where ‘[t]he record contains sufficient information to  
10 explain how the [agency used the information before it] and why it reached its decision,’ the  
11 exception does not apply.” Ctr. for Biological Diversity v. Skalski, 61 F. Supp. 3d 945, 951 (E.D.  
12 Cal. 2014), aff’d, 613 F. App’x 579 (9th Cir. 2015) (citing to Cook Inletkeeper v. U.S. EPA, 400  
13 Fed. Appx. 239, 240–41 (9th Cir.2010)). “A court should supplement the record when the agency  
14 ‘fails[s] to consider a general subject matter ..., not when specific hypotheses and/or conclusions  
15 are omitted from consideration. To hold otherwise would allow Plaintiffs to drive a truck through  
16 what is supposed to be a narrow exception to the record review rule.” Ctr. for Biological Diversity,  
17 61 F. Supp. 3d at 951–52.

18 Here, the Forest Service’s SIR and supporting materials addressed the “general subject  
19 matter” of tree mortality and the new baseline conditions for vegetation and habitat in the Frog  
20 Project area, the overlapping Fisher home ranges, the relevant landscape (“Core Area 2”), and  
21 “post-fire logging projects in the Cedar Fire area.” The Court finds that the New Declarations  
22 attack the Forest Service’s scientific judgments in selecting a methodology for updating baseline  
23 vegetation and habitat. That is not a permitted use of the relevant-factors exception. See San Luis  
24 & Delta-Mendota Water Auth., 776 F.3d at 993 (“[T]he district court erred when it used the extra-  
25 record declarations as a basis for judging the wisdom of the agency’s scientific analysis.”); Price  
26 Rd. Neighborhood Ass’n, Inc., 113 F.3d at 1511 & n.1 (holding that the district court properly  
27 barred the plaintiffs from engaging in a “battle of the experts” with their own studies to contradict  
28 those of the agency); Conservation Cong. v. Heywood, 2015 WL 5255346, at \*8 (E.D. Cal. Sept.

1 9, 2015) (striking “extra-record scientific opinion and argument submitted to undermine [the  
2 agency’s] analyses and conclusions” (alteration in original)). SF Keeper has not met its burden to  
3 show that the relevant-factors exception applies.

4 Second, SF Keeper’s New Declarations are not necessary to explain complex subject  
5 matter. “Declarations may be admissible where they aid a layperson’s understanding of the basic  
6 concepts involved in the motion, and where the proponent identifies which issues ‘can [only] be  
7 explained by supplemental evidence.’ Supplementation is inappropriate if offered to ‘suggest that  
8 [the federal agency] did not give [some information] sufficient weight.’” Ctr. for Biological  
9 Diversity, 61 F. Supp. 3d at 952 (citations omitted). Here, SF Keeper has failed to meet its burden  
10 of demonstrating that there is complex subject matter that cannot be understood through the record  
11 alone. See id. (“Plaintiffs have not shown that any referenced declaration is necessary for  
12 understanding any complex or technical matter. Therefore, Plaintiffs’ motion to supplement the  
13 administrative record is denied.”)

14 Third, SF Keeper’s New Declarations are not necessary under NEPA, because SF Keeper  
15 has not met its burden of proving that the Forest Service’s analysis did not sufficiently disclose  
16 environmental effects and swept stubborn problems or serious criticisms under the rug. Instead, SF  
17 Keeper disagrees with the Forest Service’s conclusions and is attempting to engage in an improper  
18 battle of the experts. See Price Rd. Neighborhood Ass’n, Inc., 113 F.3d at 1511 & n.1 (holding  
19 that the district court properly barred the plaintiffs from engaging in a “battle of the experts” with  
20 their own studies to contradict those of the agency.)

21 Further, perfect clarity from the agency in its explanation for its decisions is not required  
22 under Ninth Circuit precedent. See San Luis & Delta-Mendota Water Auth., 776 F.3d at 994  
23 (“Even when an agency explains its decision with less than ideal clarity, a reviewing court will not  
24 upset the decision on that account if the agency’s path may be reasonably discerned.”) Here, even  
25 if this Court were to find that Defendants explained their decision with less than ideal clarity, this  
26 Court would find that Defendants’ path can be reasonably discerned. The overall thrust of  
27 Defendants’ path is taking a long-term view of the sustainability of the forest and the danger to  
28 Fishers if their habitat is further damaged by tree mortality (such as tree mortality due to bark

1 beetles or ravaging forest fires). Therefore Defendants are willing to thin the trees in certain areas  
2 with their stated long-term goals in mind. Defendants’ plan to use the Frog Project is supported  
3 by the record and is not arbitrary or capricious.

4 Finally, to the extent that SF Keeper relies on any other claimed exceptions, the Court  
5 finds no exception that will allow SF Keeper’s New Declarations to be admitted into evidence.  
6 Therefore SF Keeper’s motion to admit extra-record evidence will be denied and the Court’s  
7 review is confined entirely to the administrative record. Lands Council, 395 F.3d at 1030 (“The  
8 scope of these exceptions permitted by our precedent is constrained, so that the exception does not  
9 undermine the general rule. Were the federal courts routinely or liberally to admit new evidence  
10 when reviewing agency decisions, it would be obvious that the federal courts would be  
11 proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise,  
12 and decision-making.”)

13 However, even if this Court were to permit the New Declarations to be admitted into  
14 evidence, it would not change the disposition of this order. SF Keeper’s New Declarations do not  
15 show that Defendants violated NEPA or NFMA and made an “arbitrary and capricious” decision,  
16 which is the Court’s inquiry here. Instead, SF Keeper’s New Declarations consist of inappropriate  
17 argument and insist that the Court review more recent data because SF Keeper claims that  
18 Defendant’s aerial survey from July 2016 is too old. These arguments are not persuasive. See  
19 Marsh, 490 U.S. at 373 (“[A]n agency need not supplement an EIS every time new information  
20 comes to light after the EIS is finalized. To require otherwise would render agency  
21 decisionmaking intractable, always awaiting updated information only to find the new information  
22 outdated by the time a decision is made.”) see also Vermont Yankee Nuclear Power Corp., 435  
23 U.S. at 554–55 (“Administrative consideration of evidence . . . always creates a gap between the  
24 time the record is closed and the time the administrative decision is promulgated . . .”)

25 Therefore the Court will deny SF Keeper’s Motion for Extra-Record Evidence and will  
26 further deny Defendants’ motion to strike as moot.

**ORDER**

Accordingly, IT IS HEREBY ORDERED that:

1. SF Keeper's Motion to Admit Extra-Record Evidence is DENIED (Doc. No. 48);
2. Defendants' Motion to Strike SF Keeper's Extra-Record Evidence or, in the Alternative, to Supplement the Record with the Declaration of Jeffrey R. Cordes is DENIED as moot (Doc. No. 52);
3. SF Keeper's Motion to Strike the Declaration of Jeffrey R. Cordes is DENIED as moot (Doc. No. 56);
4. SF Keeper's Motion for Summary Judgment is DENIED (Doc. No. 47); and
5. Defendants' and Defendant-Intervenor's Motions for Summary Judgment are GRANTED (Doc. Nos. 51, 53).

IT IS SO ORDERED.

Dated: September 15, 2017

  
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SENIOR DISTRICT JUDGE