

United States District Court

For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. BILL LOCKYER,

Plaintiff,

v.

UNITED STATES FOREST SERVICE, et al.,

Defendants.

No. C 05-00898 CRB

Related Case No C 05-00397 CRB

MEMORANDUM AND ORDER

This lawsuit is one of two companion cases concerning the Grand Sequoia National Monument, which was carved out of the Sequoia National Forest by presidential proclamation in 2000. Pursuant to the Proclamation, defendant United States Forest Service developed a programmatic environmental plan for the Monument. Plaintiff People of the State of California (“California”) challenges the Monument Plan under the National Environmental Policy Act (“NEPA”) and the Administrative Procedure Act (“APA”). California makes seven claims challenging the adequacy and sufficiency of the Monument Plan: (1) failure to create a discernible and comprehensible plan in violation of the Proclamation and the APA; (2) a similar “incomprehensibility” claim under NEPA; (3) failure to comply with the plain text of the Proclamation; (4) failure to take the requisite “hard look” under NEPA at the potential environmental impact of the Plan; (5) failure to

1 conduct an adequate cumulative impacts analysis under NEPA; (6) improper “tiering” to the
2 2004 Sequoia National Forest Fire Management Plan; and (7) failure to honor the terms of a
3 1990 Mediated Settlement Agreement regarding the Sequoia National Forest. Now pending
4 before the Court are consolidated cross-motions for summary judgment. After carefully
5 considering the parties’ thorough briefing, exhaustively reviewing the sizable administrative
6 record, and with the benefit of oral argument, the Court hereby GRANTS plaintiff’s motion
7 for summary judgment and DENIES defendants’ motion for summary judgment.

8 **BACKGROUND**

9 **I. Factual Background**

10 **A. Sequoia National Forest**

11 The Sequoia National Forest encompasses more than 11.5 million acres of land at the
12 southern end of the Sierra Nevada mountain range. In 1988, pursuant to the National Forest
13 Management Act (“NFMA”), the Forest Service issued its Land and Resource Management
14 Plan (“LRMP”) for the Sequoia National Forest. See 16 U.S.C. § 1604. After numerous
15 parties, including the California Attorney General and the Sierra Club, appealed the LRMP
16 through administrative avenues, a Mediated Settlement Agreement (“MSA”) resolved
17 outstanding issues in 1990. By its terms, the MSA applied “solely to the issues raised in
18 administrative appeals,” and limited some of the timber harvesting outlined in the LRMP. In
19 addition, the MSA required NEPA-compliant amendments to the 1988 LRMP to incorporate
20 its provisions. Administrative Record (“AR”) 1686. Finally, the MSA “provides for its
21 termination at such time as the Plan is revised in accordance with 36 U.S.C. section
22 219.10(g).” AR 1681.

23 In 1993, the 1988 LRMP was modified by the 1993 California Spotted Owl Sierran
24 Province Interim Guidelines (“CASPO”) and was then amended by the 2001 Sierra Nevada
25 Framework Plan, which applied to all 11 national forests in the Sierra Nevada, including the
26 Sequoia. Although the 2001 Framework included widespread modifications and alterations
27 of the 1988 LRMP, all parties agree that it was not intended to incorporate the MSA.
28 Further, the 2001 Framework expressly applied to the Grand Sequoia National Monument,

1 subject to any changes made in the Monument Plan required by the Presidential
2 Proclamation. In 2004, the Forest Service issued a Record of Decision on another
3 amendment to the 1988 LRMP soon after the Monument Plan was finalized.

4 **B. Grand Sequoia National Monument**

5 On April 15, 2000, President Clinton signed Executive Proclamation 7295
6 establishing the Grand Sequoia National Monument (“GSNM” or “Monument”). AR 1979-
7 1983. The Proclamation recognized the unique and extraordinary scientific and historic
8 resources of this slice of the Sequoia National Forest, including a critical mass of the rare
9 giant sequoia tree, unique wildlife endemic to the region because of its unusual ecosystem,
10 and paleontological and archaeological resources. After noting the failure of sequoia trees to
11 reproduce in the area and the increased risk of wildfire as a result of fire suppression, the
12 Proclamation asserted that “[t]hese forests need restoration to counteract the effects of a
13 century of fire suppression and logging.” AR 1980. On the other extreme, the Proclamation
14 identified the impact of five decades of heavy logging at the end of the 19th Century which
15 “resulted in the virtual removal of most forest in some areas of the monument.” AR 1981.
16 The Proclamation further noted: “Outstanding opportunities exist for studying forest
17 resilience to large-scale logging and the consequences of different approaches to forest
18 restoration.” Id.

19 Further, the Proclamation delegated responsibility to the Department of Agriculture,
20 via the Forest Service, to “implement the purpose and provisions of this Proclamation”
21 pursuant to applicable legal authorities. AR 1982. It mandated that, within three years of the
22 effective date, the Forest Service prepare a management plan for the monument and
23 promulgate appropriate regulations for its management. Id. “The plan will provide for and
24 encourage continued public and recreational access and use consistent with the purposes of
25 the monument.” Id. The Forest Service was instructed to appoint a Scientific Advisory
26 Board to provide scientific guidance during the development of the initial management plan.
27 Id.

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1 **C. Monument Management Plan**

2 In January 2004, the Forest Service issued the Grand Sequoia National Monument
3 Management Plan Record of Decision (“Plan ROD”) which further amended the 1988
4 LRMP. The Plan adopted Modified Alternative 6 of the Final Environmental Impact
5 Statement (“FEIS”), which was approved in December 2003. The Draft Environmental
6 Impact Statement (“DEIS”) was noticed to the public in December 2002, and the Forest
7 Service received more than 16,000 comments. AR 14374. The Forest Service recognized
8 that the Plan “is not presented concisely nor in one document or location;” rather, the Plan
9 “includes a considerable overlay of direction from both the 1988 [LRMP] and the 2001
10 [Framework], where that direction is consistent with the intent of the Proclamation and
11 appropriately suited to the strategy informing Modified Alternative 6.” AR 18575.

12 **D. Modified Alternative 6**

13 The FEIS included “six alternatives designed to manage the giant sequoias and other
14 objects of interest.” AR 13823. The FEIS notes that Modified Alternative 6 “will amend the
15 current [1988 LRMP], as previously amended by the [2001 Framework].” *Id.* The FEIS
16 stated that based on the Proclamation and the work of the SAB, the benchmark for
17 management strategies centered on pre-1875 conditions. AR 13830. “The structural
18 conditions, and timing, intensity, and frequency of processes that existed prior to 1875 will
19 be used as reference conditions.” *Id.* The FEIS emphasized that, “[i]n the long term,
20 [prescribed] fire will be the primary management tool for maintaining and sustaining
21 ecosystems, although mechanical treatments will be used in some instances.” *Id.* Under pre-
22 1875 conditions, “fires will generally be low intensity and occur frequently across the
23 landscape....” AR 13831.

24 Although “Modified Alternative 6 emphasizes prescribed fire as the preferred
25 treatment method to reach ecological restoration and public safety objectives, including the
26 need to promote giant sequoia regeneration,” the chosen alternative allowed for mechanical
27 treatment and/or tree removal where “clearly needed for ecological restoration and
28 maintenance or public safety.” AR 13918. Where mechanical treatments are necessary,

1 “removal of trees up to 30 inches in diameter would be allowed.” AR 13919. The diameter
 2 limit was established based upon “analysis of local information for the vegetation in the
 3 Monument.” Id. Furthermore, Modified Alternative 6 established “the restoration of recent
 4 wildfires, logged areas and associated roads, landings, and skid trails as the highest priorities
 5 for the first two decades.” Id.

6 In addition, Modified Alternative 6 retained a number of allocations and associated
 7 management strategies from the 2001 Framework. AR 13923. Three allocations from the
 8 2001 Framework—the Old Forest Emphasis Area, Southern Sierra Fisher Conservation Area,
 9 and the General Forest Allocations—are replaced in the Monument Plan by a single allocation
 10 called the Fisher/Old Forest Allocation. Id. Furthermore, the Monument Plan retains several
 11 forest-wide standards and guidelines from the 2001 Framework, and it modified a number of
 12 others. AR 13924.

13 **II. Procedural History**

14 California filed suit on March 3, 2005. This matter was subsequently related to Sierra
 15 Club, et al. v. Dale Bosworth, et al., Case No. C 05-00397 CRB (“Bosworth”), and People of
 16 the State of California ex rel. Bill Lockyer v. United States Forest Service, Case No. C 04-
 17 02588 CRB (“Fire Plan Case”).¹ The parties in this matter and Bosworth consolidated cross-
 18 motions for summary judgment, which are presently pending before the Court. A
 19 Memorandum and Order in Bosworth is filed concurrently with this Memorandum and
 20 Order.

21 **LEGAL STANDARD**

22 **I. NEPA**

23 The National Environmental Policy Act of 1969 (“NEPA”) is a procedural statute
 24 designed to ensure that federal agencies taking major actions affecting the quality of the
 25 human environment “will not act on incomplete information, only to regret its decision after
 26 it is too late.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). “The
 27

28 ¹On July 20, 2006, the Court dismissed the Fire Plan Case as moot after the Forest Service
 withdrew the Fire Plan altogether.

1 primary purpose of an [EIS] is to allow for informed public participation and informed
2 decision making.” Earth Island Inst. v. United States Forest Serv., 442 F.3d 1147, 1160 (9th
3 Cir. 2006). To that end, NEPA’s implementing regulations require that an EIS “be written in
4 plain language and may use appropriate graphics so that decisionmakers and the public can
5 readily understand them.” Id. (quoting 40 C.F.R. § 1502.8). The Ninth Circuit has
6 interpreted this regulation to require an EIS to be “organized and written so as to be readily
7 understandable by governmental decisionmakers and by interested non-professional
8 laypersons likely to be affected by actions taken under the [EIS].” Id. (quoting Or. Env’tl.
9 Council v. Kunzman, 817 F.2d 484, 494 (9th Cir. 1987)). Furthermore, the Court must give
10 “substantial deference” to NEPA’s implementing regulations, promulgated by the Council on
11 Environmental Quality (“CEQ”). Ctr. for Biological Diversity v. United States Forest Serv.,
12 349 F.3d 1157, 1166 (9th Cir. 2003) (citing Marsh, 490 U.S. at 372). “The procedures
13 prescribed both in NEPA and the implementing regulations are to be strictly interpreted ‘to
14 the fullest extent possible’ in accord with the policies embedded in the Act.” Id. (quoting 42
15 U.S.C. § 4332(1)).

16 The Court must determine whether the Forest Service adequately satisfied its duty
17 under NEPA; it must not substitute its own judgment for that of the agency. See Friend of
18 the Clearwater, 222 F.3d at 556. NEPA requires that agencies take a “hard look” at the
19 environmental consequences of their actions. Earth Island, 442 F.3d at 1159. A hard look
20 includes consideration of “all foreseeable direct and indirect impacts.” Idaho Sporting Cong.
21 v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002). The Court may conclude that a proper
22 ‘hard look’ was not conducted only if the agency’s analysis is “arbitrary and capricious or
23 contrary to the procedures required by law.” Inland Empire Pub. Lands Council v. United
24 States Forest Serv., 88 F.3d 754, 763 (9th Cir. 1996). A NEPA challenge requires a court to
25 employ a ‘rule of reason’ to determine whether the review contains a “reasonably thorough
26 discussion of the significant aspects of probable environmental consequences.” Neighbors of
27 Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998)(citations
28 omitted); see also Save the Yaak Comm. v. Block, 840 F.2d 714, 717 (9th Cir. 1988)

1 (holding that “agency action taken without observance of the procedure required by law will
2 be set aside”).

3 DISCUSSION

4 I. Standing

5 As a threshold matter, defendants once again challenge California’s standing to file
6 this lawsuit. In a previous Order, the Court denied a motion to dismiss on this precise issue,
7 holding that California was not pursuing this case *parens patriae* and had standing
8 nonetheless. Defendants assert that the burden on California is increased on a motion for
9 summary judgment, and therefore they renew their arguments on this issue on that premise.
10 Defendants present no additional or new reasons, however, that would alter the analysis of
11 the Court’s previous ruling on this matter. Accordingly, the Court finds that plaintiff has
12 standing to file this lawsuit.

13 II. The Incomprehensibility Argument²

14 Plaintiff’s incomprehensibility (or “lack of discernible plan”) argument asserts that the
15 Monument Plan is vague, unintelligible, and fails to satisfy the Proclamation’s mandate and
16 NEPA’s requirement to inform the public of, and properly analyze, the environmental
17 impacts of the Monument. The Ninth Circuit has characterized this as the “readability” or
18 “understandability” requirement. See Kunzman, 817 F.2d at 493 (holding that 40 C.F.R.
19 section 1502.8 requires that “an EIS must be organized and written so as to be readily
20 understandable by governmental decisionmakers and by interested non-professional
21 laypersons likely to be affected by actions taken under the EIS”). The Court must make “a
22 pragmatic judgment whether the EIS’s form, content and preparation foster both informed
23 decision-making and informed public participation.” Id. at 492; see also California v. Block,

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25 ²Plaintiff’s First Cause of Action is purportedly a claim under the Administrative
26 Procedures Act, alleging that “[t]he Forest Service’s failure to comply with the Proclamation
27 constitutes arbitrary and capricious agency action, is an abuse of discretion, and is contrary to
28 law and to procedures required by law.” Compl. ¶ 33 (citing 5 U.S.C. § 706(2)(A), (D)).
Although plaintiff’s motion for summary judgment mentions this claim, it does not offer
substantial legal argument or factual evidence in support of it. Moreover, plaintiff’s Second
Cause of Action under NEPA includes nearly identical language. Therefore, the Court will
address these arguments only under NEPA.

1 690 F.2d 753, 761 (9th Cir. 1982). In order to be adequate, the EIS must provide meaningful
2 analysis of the proposal offered by the agency. In particular, “[a]gencies shall make sure the
3 proposal which is the subject of the environmental impact statement is properly defined.” 40
4 C.F.R. § 1502.4(a). Here, the Monument Plan is the subject “proposal.” 40 C.F.R. §
5 1508.23 (a “[p]roposal’ exists ... when an agency subject to the Act has a goal and is
6 actively preparing to make a decision on one or more alternative means of accomplishing that
7 goal and the effects can be meaningfully evaluated”); see also AR 1982 (“The Secretary of
8 Agriculture shall prepare, within 3 years of th[e] date [of the Proclamation], a management
9 plan for th[e] monument and shall promulgate such regulations for its management as
10 deemed appropriate.”). Therefore, the Forest Service must ensure that the Monument Plan is
11 properly defined.

12 The Forest Service acknowledged that the Plan “is not presented concisely nor in one
13 document or location;” rather, the Plan “includes a considerable overlay of direction from
14 both the 1988 [LRMP] and the 2001 [Framework], where that direction is consistent with the
15 intent of the Proclamation and appropriately suited to the strategy informing Modified
16 Alternative 6.” AR 18757 (Response to Administrative Appeal). Yet plaintiff contends that
17 regulations concerning the management of the Monument must be sufficiently discernible
18 and concrete so as to provide guidelines and standards for those who implement the Plan to
19 follow without bestowing unfettered discretion on the Forest Service and its agents. To this
20 end, plaintiff makes both general and specific objections to the Plan. Generally, plaintiff
21 argues that this “overlay” of management direction referred to in the FEIS is so vague as to
22 be unintelligible and therefore in violation of NEPA. In other words, there is no direction
23 within the Plan to ascertain whether the management direction is “consistent with the
24 Proclamation” and “appropriately suited to the strategy of informing Modified Alternative
25 6,” and therefore the Plan is not “properly defined” as required by NEPA’s regulations.
26 Specifically, plaintiff asserts that the Forest Service’s assertion that standards and guidelines
27 from the 2001 Framework were carried forward to the Monument Plan is not only confusing
28 but also contradictory. The Court agrees with plaintiff on both arguments.

1 The Proclamation expressly states that the Forest Service shall manage the monument
 2 “to implement the purposes and provisions of this proclamation,” and that the Monument
 3 Plan “will provide for and encourage continued public and recreational access and use
 4 *consistent with the purposes of the monument.*” AR 1982 (emphasis added). Yet in its
 5 efforts to create a management plan pursuant to the Proclamation, the Forest Service itself
 6 explains that the Monument Plan relies primarily on the 1988 LRMP and 2001 Framework
 7 “*where that direction is consistent with the intent of the Proclamation....*” AR 18757
 8 (emphasis added). In effect, the Forest Service reiterates the purpose of the Monument Plan
 9 in defining the Monument Plan. If the Forest Service includes such a degree of redundancy
 10 in describing a plan designed to provide guidance and information to the public, then such a
 11 plan cannot possibly be “readily underst[ood] by governmental decisionmakers and by
 12 interested non-professional laypersons.” See Kunzman, 917 F.2d at 493. Nor can it fairly be
 13 described as “clearly defined” if it redundantly and abstractly defines a plan merely by
 14 reference to its purposes.

15 Furthermore, it appears that the Science Advisory Board, which was expressly created
 16 in the Proclamation to assist the Forest Service, noted a “need for a separate document,
 17 something that looks like a Management Plan.” AR 08282 (commenting on the DEIS). As
 18 the SAB declared in its official recommendation regarding the DEIS, after noting that the
 19 Plan maximizes agency discretion at a significant cost (i.e. that no one outside the agency can
 20 properly judge the adequacy of the Plan): “Alternative VI verges on saying, ‘Trust Us,’ when
 21 the historical and current social context is characterized by a profound absence of trust. The
 22 management plan yet to be drafted must contain greater overall specificity.” AR 13701. The
 23 Forest Service instead chose to clarify the FEIS by adding “references from the Proclamation
 24 and Framework, as well as visualization tools.” AR 13709.

25 The Court recognizes that the Forest Service need not establish a separate
 26 management plan; indeed, incorporating by reference and relying on other environmental
 27 impact statements or guidelines is encouraged to reduce paperwork. See 40 C.F.R. § 1500.4.
 28 Yet where an agency is charged with interpreting and promulgating regulations and

1 guidelines “pursuant to applicable legal authorities,” it cannot satisfy its legal obligations
 2 under NEPA by relying on the very documents and direction it is charged with interpreting.
 3 Accordingly, the Court finds that the convoluted “overlay” of previous Forest Service
 4 analyses with the intent and strategy of the Proclamation is incomprehensible and not readily
 5 understandable. Moreover, the Forest Service fails to “clearly define” the “proposal.” Thus,
 6 the Monument Plan broadly violates NEPA under Kunzman and the statute’s implementing
 7 regulations.

8 On a more specific level, the Forest Service’s apparent efforts to “reduce paperwork”
 9 resulted in a Monument Plan that lacks coherent or clear guidance. In particular, three
 10 allocations from the 2001 Framework—the Old Forest Emphasis Area (“OFE”), Southern
 11 Sierra Fisher Conservation Area (“SSFCA”), and the General Forest Allocation (“GF”)—are
 12 replaced in the Monument Plan by a single allocation called the Fisher/Old Forest Allocation
 13 (“FOF”). AR 13923. According to the FEIS, “[t]he FOF allocation, *in addition to the*
 14 *standards and guidelines for those three Framework allocations*, would include additional
 15 standards and guidelines....” AR 14178 (emphasis added). In other words, the FEIS not only
 16 retains the standards and guidelines from the 2001 Framework from the three allocations now
 17 incorporated into the FOF allocation, but it also adds more standards and guidelines. Yet, as
 18 defendants appear to recognize, the standards and guidelines that applied to the three 2001
 19 Framework allocations directly conflict with those that appear to apply to the FOF
 20 allocation.³ For example, the 2001 Framework OFE standards and guidelines permitted tree
 21 removal to surface and ladder fuels less than 12” diameter breast height (“dbh”) and canopy
 22 could be reduced a maximum of 10 percent across a stand down to a general minimum of 50
 23 percent. AR 2087.⁴ Yet the standards and guidelines that apparently apply to the entire
 24 Monument, including the FOF, permit tree removal up to 30” dbh, and canopy can be
 25

26 ³In addition, the standards and guidelines that apply to the three 2001 Framework
 27 allocations also conflict with each other. This adds an additional level of confusion to the
 28 Monument Plan’s management strategies.

⁴The GF and SSFCA allocations permitted tree removal up to 20” dbh and canopy
 reduction of 20 percent across a stand and 50 percent generally.

1 reduced by up to 30 percent to a minimum of 40 percent. The FEIS does not account for or
2 explain these conflicts. Nor is it clear which standards and guidelines apply to which land
3 allocations.

4 The Forest Service argues here that the 2001 Framework standards and guidelines
5 apply *except* where the Monument Plan modifies them. Defs. Rep. at *3. The Court,
6 however, disagrees. Nowhere in the FEIS—not even in the 70-page section cited generally by
7 the Forest Service—does such an explanation exist. Moreover, where land allocations overlap
8 one another, the FEIS ROD established a priority ordering system that did not favor new
9 guidelines over the old. In fact, the system prioritized those allocations, favoring those with
10 more restrictive management direction and those that are mapped. AR 13714 (FEIS,
11 Appendix D) (listing mapped allocations, including all three of the 2001 Framework that
12 comprise the FOF allocation in the Monument Plan). Furthermore, “[l]and allocations that
13 provide protections to special habitats or species are placed higher in the priority ordering.”
14 *Id.* This priority ordering system does not include any consideration of whether the standards
15 and guidelines are new or old. Yet despite this language, and despite the fact that the 2001
16 Framework guidelines are more restrictive concerning tree removal and canopy reduction,
17 there is no analysis in the FEIS of which standards and guidelines should control which land
18 allocations and when. See AR 13924-13929. Without some explanation, it is impossible to
19 reconcile the conflicting directions from the FEIS regarding which standards and guidelines
20 apply to which land allocations.

21 The Forest Service further argues that plaintiff’s arguments merely object to the
22 decisions the Forest Service reached, which the Service correctly notes would not be grounds
23 for a violation of NEPA. Undoubtedly it is clear that plaintiff objects to some of the
24 management strategies included in the Monument Plan. But here, plaintiff justifiably
25 elucidates concerns about the relevant and applicable standards and guidelines, particularly
26 about the confusing “overlay” between the FEIS and the 2001 Framework operates. Even if
27 the additional standards and guidelines described in the Monument Plan were designed to
28 supercede the Framework standards and guidelines where they conflict, it is nearly

1 impossible to determine which conflicting standards and guidelines should control. While it
 2 is not the Court's role to opine about the merits of the Forest Service's decision, it is the
 3 Court's duty to ensure that the Forest Service's Plan is coherent and readily discernible. As it
 4 pertains to the standards and guidelines to be applied to the various land allocations, the
 5 Court also finds that Monument Plan is decidedly incomprehensible.

6 **III. Tiering to Fire Plan**

7 Plaintiff contends that the Monument FEIS improperly "tiers" to the 2003 Fire Plan.
 8 Because the 2003 Fire Plan is nearly identical to the 2004 Fire Plan,⁵ which the Court found
 9 to be in violation of NEPA, plaintiff argues that the FEIS violates NEPA by relying on an
 10 invalid Fire Plan.⁶ Plaintiff further argues that the wildfire management guidelines in the
 11 FEIS are insufficient after the improper incorporation of the Fire Plan is excised from the
 12 FEIS.

13 The concept of "tiering" allows a federal agency to avoid a detailed (and repetitive)
 14 discussion by referring to another environmental document containing the necessary analysis.
 15 It is expressly permitted and recommended by NEPA's implementing regulations. 40 C.F.R.
 16 § 1502.20 ("Agencies are encouraged to tier their environmental impact statements to
 17 eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for
 18 decision at each level of environmental review."). Yet "tiering to a document that has not
 19 itself been subject to NEPA review is not permitted, for it circumvents the purpose of
 20 NEPA." Kern v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1073 (9th Cir. 2002).

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 23 ⁵Although the Court dismissed the Fire Plan Case as moot after the Forest Service
 24 withdrew the amended 2006 Fire Plan, the parties have advised the Court that this development
 does not affect this matter.

25 ⁶Plaintiff has submitted excerpts of the 2003 and 2004 Fire Plans as extra-record evidence
 26 for the Court to consider. Because plaintiff's argument is that the Forest Service improperly
 27 relied upon the 2003 Fire Plan in establishing its fire management plans, and because the FEIS
 28 and other evidence in the record directly references and cites to the Fire Plan, the Court accepts
 the extra-record evidence as appropriate to consider. In particular, because the dispute is about
 whether the Forest Service relied on the Fire Plan, the fact that it is referenced in its documents
 is sufficient to satisfy the second exception to the record review restriction. See Inland Empire
 Pub. Lands Council v. Glickman, 88 F.3d 697, 703-04 (9th Cir. 1996) (noting that the second
 of four exceptions is "when the agency has relied on documents not in the record").

1 Where, as here, NEPA review is required, tiering is encouraged as long as the relevant
2 analysis relies on a document that has been subject to an adequate NEPA analysis.

3 In the Fire Plan Case, the Court ruled that the 2004 Fire Management Plan was a
4 decisional document subject to review under the APA. Fire Plan Order at *14; see also id. at
5 *10 (“The Court finds that legal obligations flow from the Fire Plan because it is only the
6 existence of a signed Fire Plan that authorizes on-the-ground managers to depart from the
7 default national policy of total fire suppression throughout the entire forest.”). As a
8 decisional document, the Court further concluded that the Fire Plan was a “major federal
9 action” subject to the requirements of NEPA. Id. at *15. Since all parties acknowledged that
10 no NEPA review was conducted, the Fire Plan therefore violated NEPA. Id. at *17. It is not
11 disputed that the 2003 Fire Plan, which is the Plan relevant to the Monument FEIS, was
12 essentially identical to the 2004 Fire Plan. Therefore, for the purposes of this inquiry, the
13 Court notes that the Fire Plan relied upon in the FEIS was invalid under NEPA. Once the
14 invalidity of the relevant Fire Plan is established, as it is here, the question before the Court
15 becomes whether the Monument FEIS tiers to the invalid Fire Plan.

16 The Forest Service urges the Court to defer to statements in the FEIS that the FEIS
17 does not tier to the Fire Plan. See AR 18757 (noting that the FEIS refers to the Fire Plan but
18 does not rely on it in its analysis). This argument is similar to one made in the Fire Plan
19 Case, where the Forest Service contended that statements in the Fire Plan asserting that the
20 Fire Plan was not meant to be a decisional document should dispose of the matter. There, the
21 Court noted that the rationale supporting that argument, taken to its logical end, would
22 eliminate all meaningful judicial review under NEPA and the APA. Fire Plan Order at *14.
23 The Court further held that “[i]t is the content of the Fire Plan—not a statement of the
24 document’s intended function—that is the basis for the determination of whether it is a
25 decisional document.” Id. Similarly, here, it is the *content* of the FEIS that determines
26 whether it tiers to the Fire Plan, not a simple statement by the Forest Service.

27 The text of the Proclamation expressly notes that “a century of fire suppression has led
28 to an unprecedented failure in sequoia reproduction in otherwise undisturbed groves.” AR

1 1980; see also id. (“These forests need restoration to counteract the effects of a century of
2 fire suppression and logging.”). Yet the Forest Service has a default national policy of fire
3 suppression when wildfires erupt. The Fire Plan is the only guideline relevant to the
4 Monument that allows for alternative methods of responding to wildfire. See Fire Plan Order
5 at *10 (“[I]t is only the existence of a signed Fire Plan that authorizes on-the-ground fire
6 managers to depart from the default national policy of total fire suppression throughout the
7 entire forest.”); see also AR13997 (“Fires will no longer be extinguished under a default
8 response but will be suppressed for specific reasons.”). This much is clear from the plain
9 language of the FEIS: “The specific rationale for fires that are managed for resource benefits
10 will be identified in the Fire Management Plan.” Id.; see also AR 13524-25; AR13521
11 (Appendix A, Response to Comments) (“The discussion regarding the policy to suppress
12 wildfires is beyond the scope of this FEIS.”). It is therefore apparent that the Monument
13 FEIS expressly relies on this guidance from the Fire Plan in devising a strategy to respond to
14 wildfires consistent with the purpose and expectations of the Proclamation. See AR 13521
15 (“The Sequoia National Forest has a Fire Management Plan (dated July, 2003) that
16 documents the conditions under which a land manager can allow a wildfire to burn rather
17 than suppress it.”). Simply put, this reliance on the specific strategies of the Fire Plan,
18 without which alternatives to fire suppression—as required by the Proclamation—are
19 unavailable, would constitute tiering under 40 C.F.R. section 1502.20 if the FEIS does not
20 include sufficient analysis of wildfire response somewhere other than in the Fire Plan.

21 Defendants contend that, even if the Court were to find that the FEIS relied on the
22 Fire Plan for fire suppression guidance, it does not tier to the Fire Plan because it includes its
23 own, independent analysis of fire management policies. Plaintiff asserts, however, that the
24 evidence defendants rely on in support of their argument pertains only to fire and fuels
25 treatment, such as prescribed thinning (logging), and not to wildfire management, which is
26 guidance on wildfire response. The Court agrees with plaintiff.

27 The Court recognizes that there is significant interplay between wildfire response and
28 fire and fuels treatment, particularly where fuels treatment is designed to benefit wildfire

1 response. See AR 1997 (2001 Framework ROD) (“Fuel treatments increase the efficiency of
 2 firefighting efforts and reduce risks to firefighters, the public, facilities and structures, and
 3 natural resources. Fuel treatments provide a buffer between developed areas and
 4 wildlands.”). Indeed, proactive and anticipatory fuel and fire treatment is an integral element
 5 of effective wildfire management. See AR 2011 (“Alternatives that emphasize fuel
 6 treatments in a strategic pattern, and place priority for treatment in watersheds with the
 7 highest fire hazard and risk, are most likely to reduce the acres and severity of wildfires.”).
 8 Nevertheless, strategies and guidelines for fire and fuels treatment provide no guidance as to
 9 precisely how wildfires are to be managed, if and when they occur. To declare that “[f]uel
 10 conditions allow for efficient and safe suppression of all wildland fire ignitions” is to explain
 11 why fire and fuel treatment is beneficial to the ecosystem and to wildfire response; yet, it
 12 does not provide guidance or analysis as to *how* wildfires should be managed. AR 1997; see
 13 also AR 13985-87 (describing “the elements of fuels that are key to the assessment of
 14 wildland fire behavior”); AR 14124-33 (addressing advantages and strategies of the various
 15 alternative regarding fuels treatment and prescribed fire without any analysis of wildfire
 16 response).

17 _____ Many portions of the Administrative Record to which defendants direct the Court
 18 either do not contain an analysis of fire management strategies or are not part of an analysis
 19 the Forest Service has actually conducted or adopted. See, e.g., Defs. Exs. B (SAB
 20 Comments), J (Public comments on the DEIS), N (significant issues *to be* addressed by the
 21 Forest Service), and O (charts and tables without analysis). Moreover, even where defendant
 22 directs the Court to portions of the Administrative Record that appear to be on point, the
 23 substance of the material actually cuts against defendants’ argument. In the 2001 Framework
 24 ROD, which, according to defendants, provides the necessary analysis here through its
 25 incorporation into the Monument Plan, the Regional Forester states:

26 A fire management plan for each national forest ... that defines a program to manage
 27 wildland and prescribed fires *will be* completed. This fire management plan *will*
 28 *include* the management wildland fire ignitions with the appropriate management
 response or range of response tactics.

1 AR 2002 (emphasis added). See also AR 2154 (2001 Framework FEIS) (“Before wildland
 2 fires can be used, national forest managers must prepare a fire management plan that
 3 describes how prescribed fires and naturally caused wildland fires will achieve resource
 4 management objectives.”).⁷ Rather than support defendants’ contention that fire
 5 management strategies were analyzed, these portions of the record only reinforce the
 6 importance and relevance of the Fire Plan that was created subsequent to the 2001
 7 Framework. In addition, where the FEIS adopts actual analysis conducted in the 2001
 8 Framework, it again either generally summarizes current wildfire response techniques
 9 located elsewhere or emphasizes the benefits of fuel treatments to preventing devastating
 10 wildfires. See AR 13832. Even where the record actually addresses wildland fire response,
 11 it comes by way of a passing mention without analysis. See AR 13919 (Modified Alternative
 12 6) (“Wildland fire use (allowing some naturally ignited fires to burn) would be included.”).

13 In sum, the Court finds that the FEIS fails to independently analyze fire management
 14 strategies as a separate and distinct concept from fire and fuels treatment. Because the FEIS
 15 relies on this guidance from the Fire Plan, which itself is in violation of NEPA, the Court
 16 therefore concludes that the FEIS improperly tiers to the Fire Plan under Kern.

17 **IV. Breach of the 1990 Mediated Settlement Agreement**⁸

18 The 1990 Mediated Settlement Agreement represents a settlement of a dispute among
 19 a number of parties regarding administrative appeals of the 1988 LRMP for the Sequoia
 20 National Forest. Plaintiffs urge the Court to find that the Forest Service breached the MSA
 21 by abandoning the agreement and, if such abandonment was appropriate, by failing to
 22 conduct a NEPA review of such abandonment. The Forest Service, on the other hand, flatly
 23

24 ⁷To the extent that any analysis in the 2001 Framework does include fire management
 25 strategy, which the Court finds to be negligible, that Framework operated under the default
 26 policy of fire suppression which the Monument FEIS states no longer applies. See, e.g., AR 2895
 27 (2001 Framework FEIS) (“No strategic landscape fuels management has ever been implemented
 in the forested ecosystems of the Sierra Nevada at an adequate spatial scale for a sufficient
 period of time to provide a useful reference for this environmental impact statement.”).

28 ⁸Plaintiff includes this claim for relief in the Complaint and in the Motion for Summary
 Judgment but it is briefed more fully in the related case. The Court addresses this claim here
 but incorporates the arguments and briefing from the related case.

1 asserts that, by its silence regarding the MSA, the Presidential Proclamation effectively
2 supercedes the MSA and therefore renders it inapplicable.

3 The Forest Service yet again misses the point. First, as the title suggests, the MSA
4 was a resolution to a dispute between its parties—including the parties included in these
5 lawsuits—regarding the legality of the 1988 LRMP. It effectively altered the 1988 LRMP and
6 thereby became a part of the LRMP, at least until the LRMP “was revised in accordance with
7 36 C.F.R. section 219.10(g).”⁹ AR 1685. Defendants do not contend that the Proclamation
8 or the 2001 Framework, which also amended the 1988 LRMP, satisfied the conditions of
9 section 219.10(g). Moreover, the FEIS expressly notes that it “will amend the current [1988
10 LRMP], as previously amended by the [2001 Framework].” AR 13823. While it is clear that
11 2001 Framework amended the 1988 LRMP, it was not a revision in accordance with section
12 219.10. To be sure, the 2001 Framework incorporated a number of the provisions of the
13 MSA, see AR 1676-1680, but at no point has it been established that the MSA is no longer in
14 effect because of the 2001 Framework amendment. Rather, the 1988 LRMP remains the
15 foundation of the Monument FEIS, as it has been amended through the years, inclusive of the
16 MSA. Accordingly, provisions of the MSA that have been addressed in subsequent
17 amendments are no longer effective, but the MSA nevertheless remains a part of the 1988
18 LRMP in all other respects until the parties agree that section 219.10(g) has been met.¹⁰
19 While the Forest Service is correct that the MSA provided interim guidance, its interim term
20 has not yet lapsed.

21 The Forest Service apparently recognizes as much because it does not argue that the
22 2001 Framework has revised the MSA in satisfaction of the terms of the MSA. Instead, it
23 argues that the Proclamation supercedes the MSA. The Proclamation does not expressly

24
25 ⁹30 C.F.R. section 219.10(g) is no longer in effect, but it set forth the cycle by which
forest plans were regularly revised.

26 ¹⁰The Forest Service cites to a letter from the Sierra Club noting that the 2001 Framework
27 satisfactorily addressed many of the provisions of the MSA. AR 18846. The Court recognizes
28 that it may be “time to declare the process to amend the LMP called for in the MSA completed,”
id., but such a declaration has not yet officially occurred. Since there are more parties to the
MSA than just the Sierra Club and the Forest Service, this letter by no means establishes that the
MSA has been terminated pursuant to section 219.10(g).

1 mention the MSA. Through that silence, however, the Forest Service contends that the
2 Proclamation superceded the MSA. See Defs.’ Opp. at *19 (“The Proclamation replaced
3 earlier agreements unless it contained an explicit reservation.”). Yet the Proclamation does
4 state that the “establishment of the monument is subject to valid existing rights.” AR 1982.
5 Nevertheless, defendants assert that “where there was an intent to preserve existing
6 agreements the Proclamation was specific.” Defs.’ Opp. at *19. The Court disagrees.

7 In support of this argument, the Forest Service cites only to the doctrine of *expressio*
8 *unius est exclusio alterius*, “which teaches that omissions are the equivalent of exclusions
9 when a statute affirmatively designates certain persons, things, or manners of operation.”
10 ARC Ecology v. U.S. Dept. of Air Force, 411 F.3d 1092, 1100 (9th Cir. 2005). This doctrine
11 does not apply here because the Proclamation is not silent on the MSA. To the extent that
12 the MSA is not a part of the 1988 LRMP, it qualifies as a “valid existing right” because its
13 termination terms have not been met. Moreover, the Proclamation does not designate certain
14 other agreements similar to the MSA that would be preserved. Thus, even if the doctrine was
15 relevant here, which it is not, it would not apply to the MSA. Without any other support
16 excepting the MSA from the valid existing rights preserved by the Proclamation, the Court
17 finds that the MSA remains in effect to the extent it has not been amended by other NEPA-
18 compliant amendments.

19 This conclusion is further supported by the Forest Service’s own statements after the
20 Proclamation was established. On March 8, 2002, the Forest Service wrote a letter to all of
21 the MSA parties advising them as to “where [the Forest Service] believe[s] the Framework
22 does and does not meet our obligation to take certain provisions of the MSA through the
23 Land Management Plan (LMP) amendment and the NEPA process.” AR 1676. There is no
24 mention of the Proclamation superceding the MSA, nor does the Forest Service assert that
25 the 2001 Framework rectified all provisions of the MSA. This letter is consistent with the
26 Court’s ruling today.

27 The MSA is part and parcel of the 1988 LRMP until that Plan has been revised in
28 satisfaction of the terms of the MSA, which has not yet occurred. Moreover, the chosen

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1 alternative in the the FEIS directly relies on the LRMP. Accordingly, the Court finds that
2 Modified Alternative 6 is invalid where it does not account for any relevant and applicable
3 MSA provisions. When the Forest Service establishes a new Monument Plan in accordance
4 with this opinion, it shall consider the remaining applicable provisions of the MSA, at least
5 until the MSA has been terminated pursuant to its terms.

6 **CONCLUSION**

7 For the foregoing reasons, the Court concludes that the Forest Service failed to
8 comply with NEPA in preparing a management plan for the Grand Sequoia National
9 Monument as required by the Presidential Proclamation. Because the Plan violates NEPA in
10 its entirety, the Court does not address some of the other claims that identify specific aspects
11 of the Plan that may violate NEPA. Accordingly, plaintiff's motion for summary judgment is
12 hereby GRANTED and defendant's motion for summary judgment is hereby DENIED. The
13 parties shall meet and confer on a proposed form of judgment consistent with this opinion,
14 which shall be filed no later than September 15, 2006. If the parties are unable to agree, each
15 party shall file a proposed form of judgment by the same date.

16 **IT IS SO ORDERED.**

19 Dated: August 22, 2006

18 

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE