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**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

SIERRA SNOWMOBILE FOUNDATION,
et al.,

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE, et al.,

Defendants,

and

WILDEARTH GUARDIANS, et al.,

Intervenor-Defendants.

Case No.: 2:21-CV-01913-JAM-DB

**INTERVENOR-DEFENDANTS'
COMBINED RESPONSE TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT
AND BRIEF IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT
ON CROSS CLAIMS**

Hearing Date: January 10, 2023

Hearing Time: 1:30 p.m. PT

Judge: Honorable John A. Mendez

TABLE OF CONTENTS

1		
2	INTRODUCTION	1
3	FACTUAL BACKGROUND	2
4	I. FOREST SERVICE DUTY TO CONDUCT WINTER TRAVEL PLANNING.	2
5	II. ADVERSE IMPACTS FROM OVER-SNOW VEHICLE USE.	5
6	A. Over-snow vehicle use can damage soil, vegetation, and water bodies.	5
7	B. Over-snow vehicles harass and displace wildlife, disrupt habitat.	6
8	C. Over-snow vehicles disrupt non-motorized recreation users.	9
9	III. COMPLETION OF STANISLAUS WINTER TRAVEL PLAN.	10
10	ARGUMENT	12
11	I. PLAINTIFFS’ NEPA CHALLENGES REGARDING MINIMUM SNOW DEPTH LACK MERIT.	12
12	II. THE FOREST SERVICE DID NOT GO FAR ENOUGH TO PROTECT FOUR IMPERILED SPECIES FROM OSV USE.	16
13	A. The Forest Service violated NEPA by failing to take a hard look at all effects of its OSV designations.	17
14	1. Sierra Nevada red fox and Pacific marten	18
15	a. The Forest Service failed to adequately consider and disclose impacts to important habitat for Sierra Nevada red fox and Pacific marten.	18
16	b. The Forest Service failed to adequately consider impacts to Sierra Nevada red fox in the Sonora Pass OSV play area.	20
17	2. Sierra Nevada yellow-legged frog and Yosemite toad	24
18	3. Near Natural Areas	25
19	B. The winter travel plan did not minimize impacts to wildlife and wildlife habitat under the Travel Management Rule.	27
20	C. The Forest Service violated NFMA’s requirement to show the Forest Plan Amendment maintained and restored rare wildlife.	31
21	III. ANY REMEDY SHOULD LEAVE THE WINTER TRAVEL PLAN IN PLACE WHILE THE AGENCY SUPPLEMENTS ITS ANALYSIS.	34
22	CERTIFICATE OF SERVICE	37

TABLE OF AUTHORITIES

CASES

<i>All. for the Wild Rockies v. Tidwell</i> , 907 F.3d 1105 (9th Cir. 2018)	34
<i>Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n</i> , 988 F.2d 146 (D.C. Cir. 1993)	34
<i>AquAlliance v. U.S. Bureau of Reclamation</i> , 312 F. Supp. 3d 878 (E.D. Cal. 2018)	34
<i>Barnes v. U.S. Dep't of Transportation</i> , 655 F.3d 1124 (9th Cir. 2011)	17
<i>Cent. Sierra Env't Res. Ctr. v. U.S. Forest Serv.</i> , 916 F.Supp.2d 1078 (E.D. Cal. 2013)	4, 13, 27
<i>Ctr. for Biological Diversity v. U.S. Dept. of Interior</i> , 623 F.3d 633 (9th Cir. 2010)	13
<i>Friends of the Clearwater v. Probert</i> , No. 3:21-cv-56-BLW, 2022 WL 768836 (D. Idaho Mar. 12, 2022)	4, 27
<i>Humane Soc'y of U.S. v. Locke</i> , 626 F.3d 1040 (9th Cir. 2010)	34
<i>Idaho Farm Bureau Fed'n v. Babbitt</i> , 58 F.3d 1392 (9th Cir. 1995)	35
<i>Montana Wilderness Ass'n v. McAllister</i> , 666 F.3d 549 (9th Cir.), <i>aff'd</i> , 460 F. App'x 667 (9th Cir. 2011)	22, 26
<i>Native Ecosystems Council v. U.S. Forest Serv.</i> , 418 F.3d 953 (9th Cir. 2005)	17
<i>Neighbors of Cuddy Mtn. v. U.S. Forest Serv.</i> , 137 F.3d 1372 (9th Cir. 1998)	17
<i>Northern Alaska Envtl. Ctr. v. Kempthorne</i> , 457 F.3d 969 (9th Cir. 2006)	14, 16
<i>Pacific Coast Fed'n of Fishermen's Ass'ns v. Blank</i> , 693 F.3d 1084 (9th Cir. 2012)	14
<i>Pollinator Stewardship Council v. U.S. E.P.A.</i> , 806 F.3d 520 (9th Cir. 2015)	34, 35
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989)	17
<i>Snowlands Network v. U.S. Forest Serv.</i> , No. 2:11-cv-02921-MCE-DAD (E.D. Cal., filed Nov. 3, 2011)	10

1	<i>Westlands Water Dist. v. U.S. Dept. of Interior,</i>	
2	376 F.3d 853 (9th Cir. 2004)	14
3	<i>Wild Virginia v. U.S. Forest Serv.,</i>	
4	24 F.4th 915 (4th Cir. 2022)	31, 32, 33
5	<i>WildEarth Guardians v. Jeffries,</i>	
6	370 F.Supp.3d 1208 (D. Or. 2019)	4, 21, 27, 29
7	<i>WildEarth Guardians v. Montana Snowmobile Ass’n,</i>	
8	790 F.3d 920 (9th Cir. 2015)	passim
9	<i>WildEarth Guardians v. Steele,</i>	
10	545 F.Supp.3d 855 (D. Mont. 2021)	35
11	<i>Winter Wildlands Alliance v. U.S. Forest Serv.,</i>	
12	No. 1:11-cv-586-REB, 2013 WL 1319598 (D. Idaho Mar. 29, 2013)	2, 3

REGULATIONS

13	36 C.F.R. Part 212, Subpart C	14
14	36 C.F.R. § 212.50 (2005)	2
15	36 C.F.R. § 212.51(a) (2005)	2
16	36 C.F.R. § 212.55(b)	4, 27
17	36 C.F.R. § 212.80(a)	3
18	36 C.F.R. § 212.81(a)	2, 4
19	36 C.F.R. § 212.81(c)	4
20	36 C.F.R. § 212.81(d)	4
21	36 C.F.R. §§ 219.8-219.11	31
22	36 C.F.R. § 219.8(a)(1)	31
23	36 C.F.R. § 219.8(a)(3)(i)(D)	31
24	36 C.F.R. § 219.8(b)	31
25	36 C.F.R. § 219.9(a)(1)	31
26	36 C.F.R. § 219.9(a)(2)	31
27	36 C.F.R. § 219.9(a)(2)(ii)	32
28	36 C.F.R. § 219.9(b)	32

1	36 C.F.R. § 219.10(a)(1), (6), (7) & (10)	31
2	36 C.F.R. § 219.13(b)(5)	31
3	36 C.F.R. Part 261, Subpart A.....	14
4	36 C.F.R. § 295.2(a) (2004)	2
5	40 C.F.R. Part 1500	13
6	40 C.F.R. § 1500.1(b).....	17
7	40 C.F.R. § 1502.1.....	17
8	40 C.F.R. § 1502.14(d).....	13
9	40 C.F.R. § 1502.24.....	17
10	40 C.F.R. § 1508.7.....	17
11	40 C.F.R. § 1508.8.....	17
12	40 C.F.R. § 1508.25(b).....	13

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INTRODUCTION

Six years after incorporating winter travel planning into its Travel Management Rule, the Forest Service issued the first of five winter travel plans being completed for Region 5 (California) by signing the Stanislaus National Forest Over-Snow Vehicle (“OSV”) Use Designation Record of Decision (hereafter Stanislaus “winter travel plan”). This decision is the first time the Stanislaus National Forest attempted a comprehensive review of OSV use and its impacts on forest resources, wildlife, and other recreation users. Unsurprisingly, the snowmobile community is not happy with the decision because it is the first time their OSV use is being restricted. But their quibbles with the decision do not show it is unreasonable and certainly do not warrant overturning this important new plan that took years to complete.

Plaintiffs Sierra Snowmobile Foundation *et al.* (“SSF”) focus on three narrow concerns in their brief—the 5000’ elevation snow threshold, the 12” minimum snow depth requirement, and the seasonal OSV restriction for the Sonora Pass OSV play area¹ put in place to protect endangered Sierra Nevada red fox. Contrary to SSF’s assertions, these conditions on OSV use are well-supported by science and the administrative record, and the Court should reject their claims. The Forest Service conducted a thorough analysis to balance motorized and non-motorized recreation while protecting ecological resources. Not only did the Forest Service reasonably restrict OSV use to accomplish those goals, in a few narrow instances it did not go far enough to protect important resources like threatened and endangered species. Intervenor-Defendants WildEarth Guardians and California Wilderness Association (“Guardians”) thus bring several cross-claims targeting certain OSV designations in the plan that do not adequately protect rare species found on the forest.

As the first winter travel plan on the Stanislaus, it is crucial that the plan remain in place to implement the Travel Management Rule and regulate OSV use on the forest. If the Court grants any of the parties’ claims, it should not vacate but instead remand the decision without vacatur to ensure the plan will be implemented while the agency supplements its analysis.

¹ A play area is where OSVs spend extended periods of time “playing” rather than just passing through, and thus has concentrated and lengthy OSV use. AR 000418, 421.

FACTUAL BACKGROUND

I. FOREST SERVICE DUTY TO CONDUCT WINTER TRAVEL PLANNING.

For many years, the Forest Service regulated off-road vehicles through land management plans and generally allowed motorized recreation everywhere on a forest that was not specifically designated as closed to use. 36 C.F.R. § 295.2(a) (2004); *Winter Wildlands Alliance v. U.S. Forest Serv.*, No. 1:11-cv-586-REB, 2013 WL 1319598, at *2–3 (D. Idaho Mar. 29, 2013). In an effort to better control use and reduce impacts from increasingly advanced machines, the Forest Service issued a new Travel Management Rule in 2005 that flipped this policy, requiring the Forest Service to designate specific routes and areas open to off-road vehicle use and prohibit use everywhere else. 36 C.F.R. §§ 212.50, 212.51(a) (2005); *WildEarth Guardians v. Montana Snowmobile Ass’n*, 790 F.3d 920, 929 (9th Cir. 2015) (noting that “a more active approach to regulation” was needed due to increases in off-road vehicle use and technological advances) (internal quotation omitted). However, the 2005 rule made regulation of OSVs discretionary. *Id.* §§ 212.51(a), 212.81(a) (2005); *see also Winter Wildlands Alliance*, 2013 WL 13159598, at *3–6 (discussing history of rule).

Numerous conservation and recreation groups petitioned the Forest Service in 2010 to remove the OSV exemption from the Travel Rule and restrict OSVs only to areas and trails designated as open to use—just as it did for wheeled off-road vehicles. *Winter Wildlands Alliance*, 2013 WL 1319598, at *6. The groups’ petition described in detail the various impacts OSVs can have on the environment, including air pollution, water pollution, harm to soil and vegetation, noise pollution, and disturbance to wildlife, as well as conflicts between snowmobiles and non-motorized recreationists, with impacts increasing as the machines become faster and more powerful. *Id.* The Forest Service denied the petition in 2011 and the groups subsequently filed a lawsuit. *Id.* The U.S. District Court of Idaho agreed with the groups, finding the OSV exemption in the Travel Management Rule contrary to law, and ordered the Forest Service to revise the rule to incorporate OSVs into the mandatory designation scheme. *Id.* at 14.

Specifically, the Court found that the 2005 Rule violated the plain language and intent of Executive Order 11644. That Order directed the Forest Service to “establish policies and provide

1 for procedures that will ensure that the use of off-road vehicles on public lands will be controlled
 2 and directed so as to protect the resources of those lands, to promote the safety of all users of those
 3 lands, and to minimize conflicts among the various uses of those lands.” E.O. 11644, § 1, 37 Fed.
 4 Reg. 2877 (Feb. 8, 1972). The Order defined off-road vehicles to include those *traveling over*
 5 *snow*, and required the agency to issue regulations to provide for designations of areas and trails
 6 where off-road use may or may not be permitted. *Id.* §§ 2–3. Importantly, Executive Order 11644
 7 required that designations conform with specific minimization criteria:

- 8 (1) Areas and trails shall be located to minimize damage to soil, watershed, vegetation,
 9 or other resources of the public lands;
- 10 (2) Areas and trails shall be located to minimize harassment of wildlife or significant
 11 disruption of wildlife habitats;
- 12 (3) Areas and trails shall be located to minimize conflicts between off-road vehicle
 13 use and other existing or proposed recreational uses of the same or neighboring public
 14 lands, and to ensure the compatibility of such uses with existing conditions in
 15 populated areas, taking into account noise and other factors; and
- 16 (4) Areas and trails shall not be located in officially designated Wilderness Areas or
 17 Primitive Areas. Areas and trails shall be located in areas of the National Park system,
 18 Natural Areas, or National Wildlife Refuges and Game Ranges only if the respective
 19 agency head determines that off-road vehicle use in such locations will not adversely
 20 affect their natural, aesthetic or scenic values.

21 *Id.* § 3.

22 The Court held that exempting OSVs from the mandatory designation process violated the
 23 plain language and intent of Executive Order 11644, stating that “the Executive Order requires the
 24 Forest Service to ensure that *all* forest lands are designated for *all* off-road vehicles. The 2005 Rule
 25 fails to do this with respect to OSVs, and therefore fails to comply with Executive Order 11644.”
 26 *Winter Wildlands Alliance*, 2013 WL 1319598, at *11 (emphasis in original). The Court ordered the
 27 Forest Service to issue a new rule that removed the unlawful OSV exemption and was consistent
 28 with Executive Order 11644. *Id.* Notably, the Court did not remand the 2005 Rule so it remained
 in place to govern summer travel planning until the Forest Service issued a revised rule. *Id.*

In 2015, the Forest Service issued a revised Travel Management Rule that included winter
 travel planning. Subpart C of the Rule requires the agency to designate roads, trails and areas open
 to OSV use and prohibits use everywhere else. 36 C.F.R. § 212.80(a). Plans must encompass all
 National Forest lands where snowfall is adequate for OSV use to occur, and must follow the same

1 requirements as summer travel planning—public involvement, coordination with other government
 2 entities and tribes, and application of the minimization criteria. *Id.* § 212.81(a), 212.81(d). The
 3 minimization criteria mirror those in Executive Order 11644—when making OSV designations the
 4 Forest Service must minimize: (1) damage to soil, watershed, vegetation, and other forest resources;
 5 (2) harassment of wildlife and significant disruption of wildlife habitat; (3) conflicts between motor
 6 vehicle use and existing or proposed recreational uses of National Forest lands or neighboring
 7 Federal lands; and (4) conflicts among different classes of motor vehicle uses of National Forest
 8 lands or neighboring Federal lands. *Id.* § 212.55(b). Final OSV use designations must be reflected
 9 on an OSV use map made publicly available. *Id.* § 212.81(c).

10 With respect to travel planning under the 2015 Rule, courts have made clear that “mere
 11 ‘consideration’ of the minimization criteria is not enough” and instead “the Forest Service must
 12 apply the data it has compiled to show how it designated” the areas and trails open to OSV use with
 13 the objective of minimizing damage to resources, harassment of wildlife, and conflicts with other
 14 recreation uses. *Montana Snowmobile Ass’n*, 790 F.3d at 932 (citing cases). Moreover, the agency
 15 must do a granular analysis on the effects of each particularized area and trail designation rather
 16 than rely on a forest-wide reduction in total area open to OSV use to show compliance with the rule,
 17 demonstrating that it located routes and area boundaries with the objective of minimizing harm to
 18 resources, wildlife and other recreation users. *Cent. Sierra Env’t Res. Ctr. v. U.S. Forest Serv.*, 916
 19 F.Supp.2d 1078, 1096 (E.D. Cal. 2013) (Forest Service has “affirmative obligation . . . to actually
 20 show that it aimed to minimize environmental damage when designating trails and areas.”); *Friends*
 21 *of the Clearwater v. Probert*, No. 3:21-cv-56-BLW, 2022 WL 768836, at *8–11 (D. Idaho Mar. 12,
 22 2022); *WildEarth Guardians v. Jeffries*, 370 F.Supp.3d 1208, 1249–51 (D. Or. 2019). Agencies can
 23 integrate their Travel Management Rule and National Environmental Policy Act (“NEPA”) reviews
 24 into a single process but must specifically document how they evaluated and applied data to satisfy
 25 compliance with the minimization criteria for each trail and area designated for OSV use. *Montana*
 26 *Snowmobile Ass’n*, 790 F.3d at 931.

1 **II. ADVERSE IMPACTS FROM OVER-SNOW VEHICLE USE.**

2 Even though OSVs do not usually have direct contact with the ground, they still can cause
3 adverse effects to various resources, as shown in the Environmental Impact Statement (“EIS”),
4 specialist reports, and reference documents in the record here.²

5 **A. Over-snow vehicle use can damage soil, vegetation, and water bodies.**

6 Damage to soil, vegetation, and water bodies can occur if OSVs travel over inadequate
7 snow. For example, OSVs can cause compaction, rutting or disturbance of soils (particularly in
8 areas with repeated use), and riding on steep slopes can cause erosion of soils. AR 000404; AR
9 003344–45; AR 003763. These impacts are more likely to occur at the beginning and end of the
10 winter season when snow levels are lower, on exposed windy ridges, or on south-facing slopes that
11 melt more quickly. *Id.* Wet meadows are especially sensitive to soil disturbance or compaction
12 from OSV use. AR 000405; AR 003762–63. Snow compaction from heavy cross-country OSV use
13 or repeated use of trails can alter hydrologic systems by delaying snowmelt and run-off, with some
14 studies suggesting up to a two-week delay. AR 003345, 3351; AR 001673–74. OSVs that break
15 through the snowpack churn soil or create ruts in a trail surface that can cause erosion and
16 sedimentation of water bodies from snow melt run-off. AR 000397; AR 003350, 3354. The Forest
17 hydrologist noted that modern OSVs can easily displace 4 inches of snow each pass, depending on
18 snow moisture amounts. AR 003354. If the snowpack is low, OSVs can also damage vegetation
19 that is above or just below the snow surface by running over it or crushing it through snow
20 compaction. AR 003345, 3351; AR 001677. Exhaust emissions and unburned or leaking fuels
21 from OSVs can be deposited in the snowpack and later infiltrate soils or wash into streams or lakes,
22 potentially impairing vegetation, water quality and aquatic species with toxic chemicals in areas
23 with high OSV use. AR 003345–46; AR 001675–76. During spring break-up, OSVs may try to
24 cross open streams and other water bodies where there is little or no snow cover, which could also
25 result in deposition of pollutants in the water. AR 003351–52.

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27
28 ² The information below comes from the EIS and specialist reports, which cite to numerous
scientific articles included in the administrative record. *See* Administrative Record Index pp. 30-44.
INTERVENOR-DEFENDANTS’ COMBINED RESPONSE TO PLAINTIFFS AND BRIEF IN
SUPPORT OF CROSS CLAIMS — 5

B. Over-snow vehicles harass and displace wildlife, disrupt habitat.

OSVs can affect a variety of terrestrial wildlife species through direct injury, harassment or displacement of individuals, or indirect impacts to habitat. AR 000524–25; AR 004066–68. Mammals and birds that are active during winter may flee from OSVs and experience physiological stress responses, which causes expenditure of precious energy. AR 000525; AR 004068. Or they may entirely avoid areas with OSV use, reducing their winter home range and potentially displacing them from preferred habitat for feeding, sheltering, or reproducing. AR 000525; AR 004067. For animals that mate and breed in winter and early spring, OSV use or grooming activities may disrupt courtship and nesting or denning activities due to noise or visual disturbance that result in behavioral changes in the animals. *Id.* OSVs can also compact the snow, allowing access to competitors and predators that normally do not travel in deep snow, such as coyotes or bobcats. AR 000526; AR 004068. For small mammals that overwinter under the snow, OSVs may crush or suffocate them or destroy their habitat through snow compaction that reduces or eliminates the subnivean space between the snow and the ground. AR 000525–26; AR 004068.

OSV use may impact several imperiled wildlife species that occur on the Stanislaus National Forest. Forest carnivores Sierra Nevada red fox and Pacific marten both occur at high elevations where OSV use is authorized under the winter travel plan. Sierra Nevada red fox was proposed for listing under the Endangered Species Act (“ESA”) at the time the Stanislaus winter travel plan was signed, and was listed as endangered just three weeks later. AR 004086; AR 000020 (ROD signed July 13, 2021); 86 Fed. Reg. 41,743 (Aug. 3, 2021). The endangered Sierra Nevada Distinct Population Segment (“DPS”) of red fox is found along the Sierra Nevada crest from Tulare to Sierra Counties and is geographically and genetically separated from other Sierra Nevada red fox populations in California and Oregon. AR 004087. The core population of this DPS is found near Sonora Pass on the Stanislaus and Humboldt-Toiyabe National Forests, mostly above 9,000 feet elevation. AR 000540; AR 004088–89. It was believed the fox was entirely extirpated from this area but then was detected in 2010. AR 004088; AR 030969. Surveys from 2010–2018 show a year-round resident population of fox in the Sonora Pass area. AR 004088–89; AR 034600–01; AR

1 034602–27. This isolated population is very small and threatened by inbreeding. AR 004094; AR
2 030626–93. No successful reproduction had occurred since 2010 until two non-native male foxes
3 immigrated from Nevada and mated with two female Sierra Nevada red foxes, indicating the native
4 population alone could not successfully reproduce. AR 030626-93.

5 Sierra Nevada red fox are found within open meadows and rocky areas near tree line as well
6 as alpine and subalpine conifer habitat. AR 004087. They primarily eat small rodents and other
7 small mammals, and den in natural openings in rock piles at the base of cliffs and slopes. AR
8 004088. Mating occurs in late winter and early spring, with young born in March through May. *Id.*
9 Potential threats from OSVs include direct collisions, noise or visual disturbance that displaces
10 foxes from preferred habitat, compaction of snow that impairs prey living in subnivean spaces, and
11 compaction of snow that facilitates intrusion by coyotes, which compete for food with foxes and
12 may prey upon them. AR 000542–44; AR 004090–92, 4094–95. Climate change will exacerbate
13 the threats to this species because diminished snowpack levels will deplete the deep snow that the
14 fox uses to segregate itself from coyotes and other competing species. AR 004092–95.

15 Pacific marten, a Forest Service Sensitive Species in Region 5 due to reduced abundance
16 and distribution, are generally found in high elevation forested areas where they den in large trees,
17 down logs, or cavities under the snow, and in winter rest and hunt for small mammals in the
18 subnivean zone under the snow. AR 004076-77. OSV use that compacts the snow may impair
19 subnivean prey species or marten resting or den sites located under the snow. AR 000537–38; AR
20 004076, 4084. Coyotes and bobcats predate on marten and compete with them for prey, so snow
21 compaction that facilitates their access into marten winter habitat could be detrimental to marten.
22 AR 000533; AR 004076, 4080. Climate change that reduces snowpack is also a threat to Pacific
23 marten. AR 004079. Marten have been found in three areas on the forest. AR 004076–77.

24 Two rare aquatic species are also found on the forest that may be affected by OSV use.
25 Both are listed under the ESA and have designated critical habitat: endangered Sierra Nevada
26 yellow-legged frog and threatened Yosemite toad.

27 Sierra Nevada yellow-legged frog is endemic to the northern and central Sierra Nevada
28

1 range in California. AR 000486; AR 003789. They occur in lakes, ponds, streams, wetlands,
2 marshes, and meadows on the Stanislaus, largely above 7,000' elevation. AR 000487. There are
3 six sites on the forest considered occupied by Sierra Nevada yellow-legged frogs, four additional
4 historic sites, and four critical habitat units. AR 003847–49. Most current populations are very
5 small and isolated, making them vulnerable to stochastic events and inbreeding. AR 003791–92.
6 These frogs overwinter under the ice or snow in deep lakes or in rock crevices, and emerge during
7 the spring thaw period to disperse to breeding and feeding sites. AR 000504; AR 003790.

8 Yosemite toad is also endemic to California, found in wetlands and meadows above 6,500'
9 elevation. AR 000488. They occur at nineteen known sites on the Stanislaus National Forest, with
10 most sites isolated from each other because the distance between them is greater than the toad's
11 maximum dispersal distance. AR 000489; AR 003852. Most of these sites fall within one of two
12 designated critical habitat units on the forest. AR 003852. Toads hibernate during winter under the
13 snow, likely in root tangles of willows, rock crevices, or rodent burrows, and emerge in spring to
14 move to breeding sites found in shallow flooded areas within meadows or small ponds or streams.
15 AR 000508–09; AR 003793–94. Like the frog, most remaining populations are very small and
16 isolated, vulnerable to stochastic events and loss of genetic diversity. AR 003794–95.

17 OSVs can negatively affect these species both directly and indirectly. The biggest threat is
18 being hit by OSVs as the amphibians emerge from under the snow in early spring to disperse to
19 breeding sites, or their winter habitat being crushed by snow compaction. AR 000497, 504, 507–
20 08; AR 003804–06; AR 003857, 3863, 3866. They also may be stressed by OSV noise, which can
21 cause them to become immobile and more susceptible to collisions with OSVs if they are above
22 ground, interrupt breeding or feeding behaviors, alter movement patterns, or have physiological
23 reactions that deplete energy stores. AR 000497–98, 504, 507–08; AR 003806; AR 003858. Due
24 to these potential direct impacts to frogs and toads, the Forest Service and U.S. Fish and Wildlife
25 Service agreed that the OSV designations would likely adversely affect members of these species.
26 AR 003868–69; AR 003804–08, 3811–12.

27 Indirect effects to frog and toad habitat consist of ground and vegetation disturbance, snow
28

1 compaction, and chemical pollution. AR 000498; AR 003806–08. OSV use can cause snow
2 compaction that could delay snowmelt and alter local hydrology, damage meadow vegetation, or
3 reduce subnivean space, which could all affect amphibian habitat. AR 000498–99, 509; AR
4 003859. OSVs can also disturb soils and cause erosion that can degrade aquatic habitat through
5 sedimentation. AR 000499; AR 003860. Exhaust emissions or fluids from OSVs deposited on the
6 snow could lead to toxic pollutants in run-off during snowmelt that could end up in aquatic habitat.
7 AR 000501; AR 003861–62. All of these impacts would be detrimental to these two amphibians.

8 **C. Over-snow vehicles disrupt non-motorized recreation users.**

9 In addition to affecting environmental resources, OSVs can impact non-motorized
10 recreationists. Generally, non-motorized recreationists are those who cross country ski,
11 backcountry ski, or snowshoe, and they seek out quiet areas not influenced by the sound, sight, or
12 exhaust smell of snowmobiles. AR 003670. Snowmobiles can be heard for long distances and emit
13 fumes, which detracts from the natural-environment experience of non-motorized users. OSVs also
14 make tracks in the snow that disrupt cross-country ski or snowshoe trails and destroy fresh powder
15 that backcountry skiers prize. AR 003669–70. OSVs travel much faster and farther than people on
16 foot so can quickly track-up all snow near trailheads that provide access for non-motorized
17 recreationists. Because they travel at fast speeds, OSVs can also be a safety hazard to recreationists
18 on foot who may be using the same area. AR 003669. OSV use may displace non-motorized
19 recreationists who do not wish to hear, see, or smell the machines while recreating, wish to
20 experience untracked snow, or have concerns about safety in shared areas. AR 003669. Conflicts
21 between uses are generally one-sided because OSVs degrade the experience of skiers and
22 snowshoers but can quickly disperse farther to areas with little, if any, non-motorized use.

23 The EIS identified seven areas on the forest where current or potential conflict between
24 users are occurring or may occur. AR 000426–27. Some of this conflict arises because OSVs are
25 using areas that are supposed to be illegal to motorized use, such as Wilderness or Proposed
26 Wilderness or other areas designated as non-motorized. *Id.* The EIS considered how the OSV
27 designations would affect conflicts with non-motorized recreationists. AR 000434–48; AR 000172.

III. COMPLETION OF STANISLAUS WINTER TRAVEL PLAN.

In the six years since the revised Travel Management Rule came out, the Forest Service has made slight progress completing winter travel plans. Indeed, the Stanislaus winter travel plan is one of the very few to be completed. The impetus for winter travel plans in California was a prior lawsuit brought by recreation and wildlife advocates who were concerned about the Forest Service's lack of NEPA analysis to assess impacts from extensive OSV use in the Sierra Nevada Mountains. *Snowlands Network v. U.S. Forest Serv.*, No. 2:11-cv-02921-MCE-DAD (E.D. Cal., filed Nov. 3, 2011). The parties initially settled the case in 2013, with the Forest Service agreeing to undertake NEPA analysis for OSV trail grooming on five National Forests in Region 5, including the Stanislaus. *Id.* ECF No. 57-1. Once the Travel Rule was revised in 2015, however, the parties amended their settlement to combine the trail grooming NEPA with new winter travel plans under the revised Travel Rule. *Id.* ECF No. 65-1. After the parties extended initial deadlines, the Final EIS for the first winter travel plan was due March 2018. *Id.* ECF No. 69-1.

Region 5 began the OSV Program NEPA process in early 2014 for all five forests. AR 011403–08. In the early stages, the agency had joint discussions among the five forests to coordinate their analyses. *See e.g.* AR 011303, 011249, 011109, 011043, 010922, 010910. Individual forests also began their formal NEPA process, with the Stanislaus initiating its process in January 2015. AR 011074. After public meetings, the Stanislaus developed a proposed action in mid-2015 that identified the areas and trails proposed for OSV use designation and accepted public comments. AR 007120–31 (proposed action); AR 006395–7092 (scoping comments). The Forest Service received 104 letters and identified four significant issues: (1) amount and location of motorized recreation, (2) conflicts of OSV designations with non-motorized recreation, (3) authorizing OSV use in two “Near Natural” areas, and (4) effects to wildlife—particularly threatened, endangered, and sensitive terrestrial and aquatic species. AR 006283, 6289–93.

Over the course of the next five years, the Forest Service completed its NEPA process by issuing a draft EIS, Final EIS and draft Record of Decision (“ROD”), and Modified Final EIS and Final ROD for the Stanislaus National Forest OSV Use Designations, including accepting public

1 comments on the draft EIS and objections to the draft ROD. AR 001351 (draft EIS), 004538–6265
2 (EIS comments), 000904 (Final EIS), 000613 (draft ROD), 004245–4513 (objections), 000299
3 (Modified Final EIS), 000004 (Final ROD). These documents analyzed the environmental impacts
4 of five alternative actions that varied in trails and areas designated for OSV use: (1) the original
5 proposed action, (2) a “no action” alternative that supposedly continued current management, (3) an
6 alternative supported by non-motorized recreation and wildlife advocates, (4) an alternative
7 supported by OSV users, and (5) the Forest Service’s preferred alternative. AR 001404–12 (Draft
8 EIS), 000961–67 (Final EIS), 000356–70 (Modified Final EIS). In the EIS, the Forest Service
9 recognized the need to amend the Stanislaus Forest Plan to allow OSV use in two Near Natural
10 areas, explained its use of a 5,000’ elevation threshold for adequate snowfall and a required
11 minimum snow depth, and described how it applied the four minimization criteria to its OSV
12 designations to comply with the Travel Management Rule. AR 000950–61.

13 Public comments and objections contained numerous issues from both OSV proponents and
14 opponents, with OSV users pushing for more areas and trails to be designated—particularly high
15 elevation Near Natural and Proposed Wilderness areas—and complaining about the 5,000’ and 12”
16 minimum snow depth thresholds, while OSV opponents were concerned about allowing OSV use in
17 Near Natural areas, conflicts with non-motorized use, and impacts to wildlife—especially Sierra
18 Nevada red fox and Pacific marten. *See* 000031–143 (responses to public comments); 004193–205
19 (objection response). The Regional Forester directed the agency to respond to a number of the
20 objection points, including points regarding impacts to Sierra Nevada red fox and amending the
21 Forest Plan to allow OSV use in Near Natural areas. AR 004204. The Forest Service’s final EIS
22 and ROD differed slightly from the draft ROD (including by reducing the amount of area within the
23 Pacific Valley Near Natural area open to OSV use), but largely affirmed the same decision, which
24 designated eight areas and 83 miles of trails for OSV use; imposed a 12” minimum snow depth
25 requirement for all OSV areas and trails, except Stanislaus Meadow and Highland Lakes area had a
26 24” snow depth requirement; and imposed a season of use restriction on OSV use for the Sonora
27 Pass OSV play area. AR 000004–07; AR 000312–13.

ARGUMENT

The Stanislaus winter travel plan is a key piece of the Forest Service’s multiple-use management direction that balances OSV use with other uses of the forest. Previously, OSV use was largely unregulated on the forest. The agency’s Travel Management Rule demands a different approach. OSVs are required to be restricted to specific areas and trails, which must be located to minimize harm to natural resources, wildlife, and other recreation users. Here, the Forest Service reviewed extensive science and undertook a thorough analysis to appropriately restrict OSV use. In fact, those restrictions did not go far enough to minimize harm to four imperiled wildlife species. Thus, while the new plan is a key piece of the Stanislaus’ forest management that must remain in place, the agency should supplement its analysis and amend its decision to protect the four species.

I. PLAINTIFFS’ NEPA CHALLENGES REGARDING MINIMUM SNOW DEPTH LACK MERIT.

SSF spends much of its brief raising NEPA challenges concerning the plan’s minimum snow depth requirement. SSF argues the “no action” alternative did not accurately portray the historic snow depth requirements, and the Forest Service should have considered an alternative action that used a lower minimum snow depth. SSF Brief at 17–23. Both of these arguments fail because a 12” snow depth requirement was already in place on the forest, and the agency determined such a minimum was necessary to protect resources and thus was incorporated into all action alternatives.

First, SSF claims that, while the Forest Plan has always required a 12” minimum snow depth for cross-country OSV use, it did not have a minimum snow depth for OSV *trails* and thus a snow depth requirement for trails should not have been part of the environmental baseline. SSF Brief at 17–18. But SSF’s argument ignores a key fact: there has always been a 12” minimum snow depth requirement for groomed trails because the State does the grooming and mandates at least 12 inches of snow for regular grooming and at least 18 inches of snow for the first groom of the season. AR 000371, 428; AR 003837; AR 011059–60; AR 016856. And prior to this winter travel plan, the Forest Service was not required to designate the specific areas and trails open to OSV use. AR 000344, 366. Accordingly, there were far fewer miles of designated trails under the “no action”

1 environmental baseline compared to the other alternative actions, and most were groomed trails
 2 with a 12” minimum snow depth requirement for grooming. *See* AR 000387–88 (chart comparing
 3 miles of trails between alternatives). In sum, it was reasonable for the Forest Service to consider the
 4 12” minimum snow depth generally applied to all prior OSV use when groomed trails and cross-
 5 country use were under that mandate.

6 SSF points to no evidence in the record showing significant OSV use of the limited
 7 ungroomed trails when there was less than 12 inches of snow. SSF Brief at 17–18 (failing to cite
 8 any evidence of regular OSV use on ungroomed Stanislaus trails with less than 12 inches of snow).
 9 Indeed, the EIS stated that groomed routes get far more use than ungroomed routes in general. AR
 10 000419. The purpose of describing the environmental baseline for a no-action alternative is to
 11 compare the effects of the status quo with effects of the action alternatives. *Ctr. for Biological*
 12 *Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 642 (9th Cir. 2010). As the Forest Service itself
 13 noted, a no-action alternative provides “a benchmark to compare the magnitude of environmental
 14 effects of the action alternatives” AR 000359 (citing 40 C.F.R. §§ 1502.14(d), 1508.25(b), 46
 15 Fed. Reg. at 18027).³ The Forest Service’s baseline of a uniform 12” snow depth to compare
 16 effects of alternatives was not arbitrary and capricious when there was a prior 12” snow depth
 17 minimum for cross-country OSV use *and* grooming of trails, and no evidence that OSV use
 18 frequently occurred on ungroomed trails with less than 12 inches of snow. *See Cent. Sierra Env’t*
 19 *Res. Ctr.*, 916 F.Supp.2d at 1091–92 (rejecting claim in travel management case that environmental
 20 baseline was inaccurate when plaintiffs offered no factual evidence in support).⁴

21 Second, SSF asserts the Forest Service failed to consider a reasonable range of alternatives
 22 by not including an alternative with a lower minimum snow depth. SSF Brief at 19–23. Such an
 23 alternative would not be reasonable, however, because it would be inconsistent with the project
 24 _____

25 ³ As SSF notes, all citations are to the 1978 Council on Environmental Quality regulations, 40
 26 C.F.R. Part 1500. SSF Brief at 2 n.2.

27 ⁴ SSF similarly claims that the environmental baseline was flawed because the Forest Service
 28 incorrectly asserted no OSV use ever occurred below 5,000’ elevation. SSF Brief at 14–17.
 Intervenor join in the Forest Service’s response to that claim and note that such use would have
 been infrequent based on SSF’s evidence showing snow occurred below 5,000’ just three times
 between 2011–2019. SSF Brief at 15 (citing AR 034658; AR 004410–14).

1 purpose and underlying statutory mandate. Agencies need only consider alternatives that are
2 reasonably related to the purposes of the project, as defined in the agency's purpose and need for
3 action. *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 868 (9th Cir. 2004). Thus,
4 NEPA does not require an agency to discuss alternatives that are infeasible, ineffective, or
5 inconsistent with the agency's basic policy objectives of the project. *Pacific Coast Fed'n of*
6 *Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1100 (9th Cir. 2012) (cleaned up). It is proper for an
7 agency to eliminate an alternative from detailed consideration if it reasonably explains that the
8 alternative was inconsistent with the project purpose and statutory mandates. *Northern Alaska*
9 *Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969, 978–79 (9th Cir. 2006).

10 When it initiated the EIS process, the Forest Service recognized the need “to provide a
11 manageable, designated OSV system of trails and areas within the Stanislaus National Forest that is
12 consistent with and achieves the purposes of the Forest Service Travel Management Rule.” AR
13 004242. The EIS itself also stated that the purpose and need for the Stanislaus winter travel plan
14 stems from the revised Travel Management Rule, 36 C.F.R. Part 212, Subpart C and Part 261,
15 Subpart A. AR 000338. The project is intended to establish a manageable system of designated
16 trails and areas on National Forest lands for OSV use to, *inter alia*, “ensure that OSV use occurs
17 when and where there is adequate snow for that use to occur,” and “minimizes impacts to natural
18 and cultural resources.” *Id.* The EIS further discussed the Travel Management Rule minimization
19 criteria that must guide the OSV designations. AR 000332–33. The agency conducted a separate
20 six-step analysis to apply the minimization criteria to areas and trails being considered for OSV
21 designation. AR 000334–35, 350–52; AR 000153–279.

22 In this process, Forest Service experts analyzed effects of OSV designations to soils,
23 watersheds, vegetation, cultural resources, wildlife or their habitats, and recreation experiences to
24 address the minimization criteria from the Travel Rule, and determined if areas or trails needed to
25 be excluded to minimize impacts or whether management prescriptions could sufficiently mitigate
26 harm. AR 000350–51. The 12” minimum snow depth requirement was a primary management
27 prescription to minimize damage to soils, water resources, vegetation, cultural resources, and
28

1 aquatic wildlife and their habitat. AR 000154–66. Because this measure was imposed to comply
2 with the Travel Rule’s minimization mandate, it necessarily had to be included in all the alternative
3 actions in the EIS. An alternative without that measure would have been inconsistent with the
4 Travel Rule’s requirements, and thereby not meet the purpose of the project.

5 SSF’s claim that there was no science to support a 12” minimum snow depth falls flat. First,
6 a strong basis for the 12” minimum comes from the Stanislaus Forest Plan and the State of
7 California grooming requirements. The Stanislaus was already imposing a 12” minimum snow
8 depth for cross-country OSV use, and the State was already using that requirement for grooming
9 trails. AR 011518; AR 000371. The Forest Service would have needed strong scientific support to
10 consider a less protective measure. Indeed, the agency experts began by considering a 6” minimum
11 for trails, 12” minimum for cross-country use, and 18” minimum for grooming. *See* AR 011056–73
12 (preliminary analysis on proposed minimum snow depths). But after review of scientific articles
13 and management prescriptions by other agencies, they supported the all-around 12” minimum as the
14 appropriate standard to minimize harm to resources. *See* AR 000345–48 (EIS); AR 000153–66
15 (EIS App. C—Minimization Criteria Management Requirements); AR 001667–68, 1673 (botany
16 report); AR 003350–53 (hydrology report); AR 003762–63 (soils report); AR 003857–69 (aquatic
17 wildlife biological assessment); AR 010780 (EPA comments recommending 12” snow depth). As
18 the EIS explained, the agency considered modifying the minimum snow depth to less than 12”, but
19 did not include that change in any of the alternatives because Forest resource specialists
20 unanimously agreed that a 12” minimum provided a means to minimize the likelihood of resource
21 damage from OSV use. AR 000384.

22 SSF offers no scientific support to undercut the professional opinion of these experts, other
23 than to note the agency has stated there is no universal nationwide minimum snow depth because of
24 the variability of snow conditions. SSF Brief at 20. But the Forest Service is not trying to impose a
25 universal nationwide minimum snow depth. It developed a minimum snow depth for the Stanislaus
26 based on its specialists’ review and application of science to the local conditions. In particular, the
27 experts noted that resources are most vulnerable in the early and late winter season when snow
28

1 depths are most variable; a minimum snow depth provides a quantifiable and tangible way to
2 manage when OSV use occurs during these vulnerable periods and to ensure adequate snow depth
3 before use occurs. AR 000345. In other words, it helps provide a “manageable” system of OSV
4 trails and areas with “adequate snow”—stated purposes of the project. AR 000338. The ROD also
5 concluded that the 12” minimum snow depth was necessary to ensure compliance with the Travel
6 Rule minimization criteria. AR 000013–14. Rejecting an alternative that the agency did not believe
7 would meet the requirements of the Travel Management Rule and purpose and need of the project
8 was not unreasonable. *Northern Alaska Envtl. Ctr*, 457 F.3d at 978–79.

9 Finally, SSF claims the Forest Service did not respond to public comments about the 5,000’
10 elevation threshold for adequate snow and the 12” minimum snow depth. SSF Brief at 23–25. The
11 record belies that claim. The Final EIS and ROD thoroughly discussed why the agency used those
12 thresholds. AR 000013–14 (ROD); AR 000345–48, 357–58, 366, 384, 419 (EIS); AR 000073, 98,
13 105 (EIS App. B—Response to Comments).

14 SSF clearly does not like the end result of the Stanislaus winter travel plan, which regulates
15 OSV use on the forest for the first time and reduces the area available for that use. But that dislike
16 does not translate into NEPA violations. The Forest Service’s adoption of the 5,000’ elevation
17 threshold for adequate snow and the 12” minimum snow depth complied with law.

18 **II. THE FOREST SERVICE DID NOT GO FAR ENOUGH TO PROTECT** 19 **FOUR IMPERILED SPECIES FROM OSV USE.**

20 SSF also disputes the season of use restriction for the Sonora Pass OSV play area and the
21 additional acres closed within the Pacific Valley and Eagle Near Natural areas. SSF Brief at 26–33.
22 However, as explained below, the Forest Service’s OSV restrictions *did not go far enough* to protect
23 Sierra Nevada red fox, Pacific marten, Sierra Nevada yellow-legged frog, and Yosemite toad. The
24 record here shows the agency did not adequately consider the effects of the OSV designations on
25 these species nor minimize harm to them and their habitat when deciding where to designate OSV
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27
28

1 use, in violation of NEPA, the Travel Rule, and the National Forest Management Act.⁵

2 **A. The Forest Service violated NEPA by failing to take a hard look at all effects of**
 3 **its OSV designations.**

4 NEPA requires that an EIS provide a “full and fair discussion of significant environmental
 5 impacts,” and inform “decisionmakers and the public of the reasonable alternatives which would
 6 avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. §
 7 1502.14. This obligates agencies to “carefully consider” a project’s potential environment impacts
 8 and ensure “relevant information will be made available,” so that the public can “play a role in both
 9 the decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley*
 10 *Citizens Council*, 490 U.S. 332, 349 (1989).

11 To satisfy its obligations under NEPA, agencies must take a “hard look” at direct and
 12 indirect effects of a proposed action and alternatives, plus cumulative impacts from other past,
 13 present, and foreseeable future actions. 40 C.F.R. § 1508.7 & 1508.8; *Barnes v. U.S. Dep’t of*
 14 *Transportation*, 655 F.3d 1124, 1131, 1136, 1141 (9th Cir. 2011). This requires a “reasonably
 15 thorough discussion of the significant aspects of probable environmental consequences.” *Neighbors*
 16 *of Cuddy Mtn. v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998). “To take the required
 17 ‘hard look’ at the proposed project’s effect, an agency may not rely on incorrect assumptions or
 18 data.” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005). An EIS
 19 must contain high quality information supported by accurate scientific analysis. 40 C.F.R. §
 20 1500.1(b) (high quality information and accurate scientific analysis are essential to implementing
 21 NEPA); *id.* § 1502.24 (agencies must ensure scientific integrity of analyses). And “[t]o fulfill
 22 NEPA’s public disclosure requirements, the agency must provide to the public ‘the underlying
 23 environmental data’ from which the Forest Service develops its opinions and arrives at its
 24 decisions.” *Montana Snowmobile Ass’n*, 790 F.3d at 925 (cleaned up).

25 The Forest Service failed to take a hard look at the effects of the OSV designations on the
 26

27 ⁵ Plaintiffs submit the declarations of Darca Morgan, Chris Krupp, and Steven Evans to establish
 28 standing for their Cross Claims.

1 imperiled Sierra Nevada red fox, Pacific marten, Sierra Nevada yellow-legged frog, and Yosemite
2 toad. It also failed to take a hard look at the effects of opening up Near Natural Areas to OSV use.

3 **1. Sierra Nevada red fox and Pacific marten**

4 The Stanislaus winter travel plan designates OSV use in areas occupied by two imperiled
5 forest carnivores. The Sierra Nevada red fox DPS, listed as endangered under the ESA just three
6 weeks after the Forest Service signed the Stanislaus winter travel plan ROD, has an estimated
7 population of only 21 breeding individuals. AR 004090; AR 000541. This species is on the brink
8 of extinction and impacts to individual members risk extirpation of the entire population. The
9 Pacific marten, a Forest Service Region 5 “sensitive species” and a California “species of special
10 concern” due to its declining numbers, also occurs on the forest. Both species occupy high
11 elevation remote areas on the forest. As discussed above, OSV use can have detrimental impacts to
12 both species through snow compaction that facilitates habitat intrusion by predators and competitors
13 like coyotes, as well as through disturbance and displacement of individuals from preferred habitat,
14 direct injury or mortality, or habitat alteration or fragmentation. *See supra* pp. 6–7; AR 000533,
15 537, 542, 543. The Forest Service failed to take a “hard look” at the impacts of OSV use in key
16 habitat areas for both the red fox and marten, particularly in the Sonora Pass area.

17 **a. The Forest Service failed to adequately consider and disclose impacts to**
18 **important habitat for Sierra Nevada red fox and Pacific marten.**

19 The Forest Service first violated NEPA by failing to adequately identify and disclose the
20 location of red fox and marten occupied and suitable habitat on the forest and where that habitat
21 overlaps with OSV use designations. *See* AR 004202 (Obj. Resp.). Habitat the species are known
22 to use based on documented locations is the most important habitat to consider given the species’
23 preference for those areas. Assessing and disclosing impacts to that occupied habitat is critical. In
24 fact, the Forest Service Manual recognizes the importance of identifying and describing occupied
25 habitat for imperiled species, and analyzing the effects of proposed actions on occupied habitat. AR
26 004056-57. Yet the EIS did not reveal the areas of the forest occupied by red fox or marten other
27 than a few general statements. AR 000532, 540–41. Instead, the Forest Service simply tallied the
28 total amount of OSV use within the “zone of influence” for each species, meaning within 400

1 meters of “preferred or occupied habitat” for marten or within 5 miles of known locations of red
2 fox. AR 000523, 534, 545. Cumulative total acres designated open to OSVs within the zones of
3 influence does not adequately assess impacts to the habitat actually used by these species. For
4 instance, OSV use that overlaps areas regularly used by the species would have a greater impact
5 than OSV use occurring several miles away but the Forest Service’s analysis did not disclose the
6 location of habitat the species have been documented using and proximity of OSV designations.

7 Further, the location of the species’ “suitable” habitat was not clearly identified in the Final
8 EIS despite the Deputy Regional Forester recommending that the Forest Service “[m]ore clearly
9 identify where [red fox] suitable habitat occurs on the Forest.” AR 004204 (Obj. Resp.); AR
10 000532, 535-37, 540-41, 545 (describing only general habitat characteristics and total acreage). By
11 failing to reveal the specific location of the species’ occupied and suitable habitat, as well as
12 predicted denning habitat, and where those areas occur in relation to the OSV designations, the
13 agency did not take a hard look at OSV impacts on red fox or marten. *Montana Snowmobile Ass’n*,
14 790 F.3d at 925 (although the EIS listed the percentage of big game winter range located in the area
15 in the EIS, the agency’s failure to provide information about where habitat range was actually
16 located and the concentration of game in each area violated NEPA’s disclosure requirements).

17 To compound this problem, the Forest Service ignored data documenting additional
18 detections of both Pacific marten and Sierra Nevada red fox on the Stanislaus that it had in its
19 possession. Biologists with Central Sierra Environmental Resource Center (CSERC) provided the
20 Forest Service with years of photo detection data showing both species in areas frequented by
21 OSVs, yet the Forest Service failed to consider it in its analysis. This data was mentioned in scoping
22 comments, public comments to the draft EIS, and objections to the final EIS, *see, e.g.*, AR 004313;
23 AR 005231; AR 005235; AR 006840, but it was not included in the administrative record, *see* AR
24 Index pp. 39-45 (red fox reports and data added to record did not include CSERC data). In fact, as
25 CSERC mentioned in its objections, the Response to Comments portion of the FEIS completely
26 ignored high-marking of snowmobiles across “habitat where foxes have been shown to take shelter
27 based on . . . years of photo-detection surveys.” AR 004313. *See also* AR 000031-143. Likewise,

1 there is photo-detection evidence of Sierra Nevada red fox in the Pacific Valley Near Natural Area,
 2 and Pacific marten in both the Pacific Valley Near Natural Area and portion of Eagle Near Natural
 3 Area designated for OSV use, which the Forest Service also did not consider in its analysis. *See* AR
 4 005231; AR 005235. Because the Forest Service did not consider this detection data, its calculations
 5 of the zone of influence for the fox and marten were flawed due to an incomplete dataset,
 6 undermining the Forest Service’s conclusions that impacts to red fox and marten would be
 7 insignificant. *See* AR 000539, 545–46.

8 Additionally, the Forest Service improperly assumed little OSV use occurs in marten
 9 habitat areas. The agency’s impact analysis rests in large part on the fact that marten prefer dense,
 10 forested areas that OSV users do not frequent. *See* AR 000533, 539. The Forest Service concluded
 11 that the areas with dense trees preferred by marten are “not conducive to OSV use and would be
 12 avoided by the majority of users.” *See, e.g.*, AR 000410. However, public comments from SSF
 13 contradict this assumption. AR 005637–38 (“Modern snowmobiles regularly ascend *treed slopes*
 14 greater than [19.5 degrees].” (emphasis added)). Moreover, recent wildfires on the Stanislaus have
 15 created openings in once-forested areas, further increasing the likelihood of OSV use in marten’s
 16 preferred habitat. AR 000538. The Forest Service failed to consider this relevant information in its
 17 analysis, which undermines its conclusion about impacts to Pacific marten.

18 The Forest Service failed to take a hard look at the effects of the OSV designations on Sierra
 19 Nevada red fox and Pacific marten by ignoring years of photo detection data it had on these species,
 20 failing to analyze and disclose the specific areas known to be used by them in relation to OSV
 21 designations, and relying on improper assumptions about OSV use in marten habitat.

22 **b. The Forest Service failed to adequately consider impacts to Sierra**
 23 **Nevada red fox in the Sonora Pass OSV play area.**

24 The Forest Service’s decision to allow a high volume of OSV use in the Sonora Pass area
 25 through April 15 (or possibly April 30) is based on inaccurate and misleading information and fails
 26 to consider important direct and indirect impacts, thus rendering it arbitrary and capricious.⁶

27 ⁶ The points in this section refute the points raised by SSF regarding its challenge to the Sonora Pass
 28 seasonal closure, SSF Brief at 26-30.

1 The EIS admitted that the core population of endangered Sierra Nevada red fox is found in
2 the Sonora Pass area. AR 000540–41. As noted above, however, it failed to identify the location of
3 occupied and suitable red fox habitat and its proximity to the OSV designations, including for the
4 Sonora Pass OSV play area. This alone was a significant hole in the Forest Service’s analysis. *See*
5 *supra* pp. 18–19. Relatedly, although the Forest Service acknowledged that the Sierra Nevada red
6 fox is a year-round breeding population, AR 000540, the agency did not identify possible denning
7 habitat in the Sonora Pass area despite having ample information about the fox’s known locations,
8 preferred denning habitat, and breeding patterns. *See, e.g.*, AR 000540–41; AR 030626; AR
9 004088. It should have used that information to predict likely den sites and incorporate them into its
10 analysis of OSV impacts given the extreme importance of protecting the fox’s reproduction and
11 Forest Service direction emphasizing protection of forest carnivore den sites. AR 004050, 4053–55;
12 *WildEarth Guardians v. Jeffries*, 370 F. Supp. 3d at 1240 (agency failed to take a hard look at
13 impact on elk calving and rutting sites when it did not adequately identify those areas or
14 “sufficiently articulate... how those areas will be protected during the time [off-highway vehicle]
15 use overlaps with calving and rutting seasons.”).

16 Moreover, the Forest Service underestimated the extent of OSV impacts to red fox in the
17 Sonora Pass area. The agency relied “on current environmental conditions as a proxy for the
18 impacts of past actions,” and assumed the same level of impacts would continue. AR 000389. The
19 Sonora Pass area remains designated for OSV use and is a highly desirable OSV play area, but there
20 are overall less areas open for OSV use under the new plan, especially desirable high-elevation
21 areas. *See infra* p. 26; SSF Brief at 32–33 (noting omission of desirable high-elevation areas from
22 final OSV designations). Thus, it is likely that OSV use will become more concentrated in the
23 Sonora Pass area, increasing the likelihood of disturbing foxes and altering their behavior and
24 habitat use, fragmenting their habitat, and compacting snow. *See* AR 004605; AR 004606; AR
25 005502; AR 006126; AR 006179 (OSV-users indicating preference for snowmobiling in Sonora
26 Pass area). *See also* AR 004718; AR 005307 (“Sonora pass is a legendary riding area that people
27 from all over the United States have traveled to and ride”). Foxes that may have “habituated” to
28

1 prior OSV use may be affected by an increase in OSV traffic. AR 000543. The Forest Service
2 failed to consider that the volume of OSV use would increase in this area under the new winter
3 travel plan given the closure of other high-elevation areas, and the impact of that increase on the
4 Sierra Nevada red fox, in violation of NEPA. *See Montana Wilderness Ass'n v. McAllister*, 666 F.3d
5 549, 558 (9th Cir.), *aff'd*, 460 F. App'x 667 (9th Cir. 2011) (Agency violated NEPA when it “made
6 no attempt to consider or account for . . . impacts of increased volume of use.”).

7 The Forest Service also assumed there will be minimal temporal overlap between red fox
8 activity and OSV use because the species is nocturnal. *See, e.g.*, AR 000542. Yet elsewhere, the
9 Forest Service acknowledged that 29% of snowmobilers do nighttime riding and grooming occurs at
10 night. *See* AR 000525. These inconsistencies show the Forest Service underestimated the extent to
11 which OSV use in the Sonora Pass area could impact Sierra Nevada red fox.

12 Another significant flaw in the Forest Service’s analysis is its reliance on the April 15 (or up
13 to April 30) seasonal closure date to protect the Sierra Nevada red fox during their sensitive
14 breeding cycle. AR 000006–07 (seasonal closure could be extended to last Sunday in April). SSF
15 claims the science does not support the seasonal closure, SSF Brief at 26–30, and it is correct; the
16 science shows the closure *is not restrictive enough*. Foxes select their den sites as early as
17 December, and pups are born sometime between March and May. AR 004631; AR 004088. OSV
18 use during this time could disturb and displace the animals during den site selection, making them
19 choose a less preferable den; it could disturb pregnant or nursing females and thereby impair
20 breeding success; or it could cause snow compaction that facilitates intrusion by coyotes, which
21 increases risk of predation of foxes and competition for prey. AR 004631; AR 004091–92, 4094–
22 95. SSF claims the seasonal closure is not supported by science showing coyotes will use
23 compacted snow for movement or prey upon Sierra Nevada red fox. SSF Brief at 26–28. The
24 Forest Service recognized the uncertainty in the science on this issue but determined that coyote
25 intrusion into red fox habitat due to OSV use was a risk based on the available science. AR
26 004091–92, 4094–95.

1 Furthermore, both SSF and the Forest Service fail to adequately acknowledge and discuss
2 the most applicable information available: comments from the scientists that studied this population
3 and have the most in-depth knowledge of it. *See* AR 004630–33; AR 004658–59. These scientists
4 researched this population for more than five years, identifying its preferred habitat and tracking
5 abundance. AR 030626–93; AR 030834–70. The Forest Service cited their study and noted their
6 research showed a very small population with inbreeding depression. AR 004094. But it failed to
7 acknowledge and discuss comments from these scientists that “poor reproduction appears to have
8 been the primary factor inhibiting population growth in the Sierra Nevada red fox population,” and
9 that the April 15th seasonal closure date is “woefully inadequate to protect pregnancies or neonates
10 from impacts.” AR 004631. *See also* AR 004658–59. Indeed, the Forest Service has recognized that
11 a seasonal restriction from January 1 to June 30 is needed to protect the fox’s breeding period. AR
12 004054; AR 011443. The best available science thus supports a full closure of the Sonora Pass
13 OSV play area to adequately protect the fox during its entire critically important breeding season.

14 Finally, the Forest Service improperly assumed that impacts to individual foxes is
15 distinguishable from potential impacts to the population as a whole. *See, e.g.* AR 000525
16 (discussing potential for OSV collisions with mammals). But the Sierra Nevada red fox population
17 is so small that impacts to one individual—particularly a breeding female—could have a significant
18 effect to the entire population. AR 000541 (noting population is small and highly isolated from
19 other Sierra Nevada red foxes); AR 004197 (small impacts to population could be significant). The
20 ROD states that the population “although small, is stable and appears to be increasing.” AR 000011.
21 But the agency does not acknowledge that the only reason the Sierra Nevada red fox population
22 increased in recent years is because of the immigration of two *non-native* Great Basin foxes into the
23 population, which bred with the Sierra Nevada red fox. AR 030639, 30645; *see also* AR 000542.
24 And as the Forest Service itself recognized in the EIS, the Sierra Nevada red fox population is
25 estimated to contain only 21 breeding individuals, significantly less than the effective population
26 size of 50 that is necessary to have a viable population that avoids inbreeding depression and other
27 issues. AR 000541. Thus, the Forest Service’s conclusion in the ROD that adverse effects to
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individual foxes would not result in impacts to the viability of the population is undermined by the evidence in the record and contradicted by other statements the agency itself made.

2. Sierra Nevada yellow-legged frog and Yosemite toad

The Stanislaus winter travel plan also designates OSV use in key occupied and critical habitat of the endangered Sierra Nevada yellow-legged frog and threatened Yosemite toad. OSV use can negatively impact these sensitive aquatic species directly—through collisions or from noise disturbance—as well as indirectly—through ground and vegetation disturbance, snow compaction, and chemical pollution. AR 000497–99; *supra* pp. 8–9. An adequate minimum snow depth requirement helps reduce the likelihood of such impacts. *See, e.g.*, AR 000505, 508.

In light of these potential impacts, and the highly imperiled status of the species, the Forest Service violated NEPA by failing to take a “hard look” at the effectiveness of its mitigation measures to adequately protect these aquatic species.

Like for the fox and marten, the EIS largely relied on total acres of suitable habitat with OSV designations to assess impacts to these species rather than considering impacts to known occupied sites. AR 000504-05, 509. In fact, the EIS did not identify the meadows historically or currently occupied by the frog and toad despite including that information in the biological assessment, or that many of these meadows are in moderate use OSV areas. AR 000487-90; AR 003847-54; AR 003801-02. Instead, the Forest Service relied on minimum snow depths to mitigate all impacts. AR 000505-10. While the agency appropriately imposed a 24” minimum snow depth for Stanislaus Meadow and the Highland Lakes area because of the expected moderate to high OSV use there, it failed to impose the same snow depth requirement for other occupied meadows and critical habitat that are also expected to receive moderate or high OSV use. AR 000006; AR 003801–02; AR 003847–57.

The lack of a 24” minimum snow depth for the Herring Creek area is particularly arbitrary. Like Highland Lakes (and Stanislaus Meadow for the frog) the Herring Creek area contains one of the largest and most at-risk populations of Yosemite toad as well as designated critical habitat. AR 003852–54, 3866. Both U.S. Fish and Wildlife Service and the Forest Service recognized the

1 high risk from OSV use to Yosemite toads in the Herring Creek complex. AR 003805; AR 003866.
2 Although the Forest Service acknowledged the proximity of Herring Creek OSV-use areas and trails
3 to Yosemite toad habitat, it concluded that any effects to the toad will be “low in frequency,
4 duration, and magnitude” because “the use is not concentrated.” AR 000508. However, there are
5 many specific mentions of Herring Creek in the public comments submitted by OSV users,
6 including that it has “great riding,” AR 005683, and otherwise suggesting that it is a popular area
7 among OSV users. *See* AR 005797, AR 006101, AR 006125, AR 006122, AR 006211, AR
8 006232, AR 006235. *See also* AR 003854, AR 003802 (describing OSV use in multiple Herring
9 Creek meadows as moderate).

10 Because the EIS did not identify OSV designations in relation to known locations of these
11 species, and failed to justify not imposing a 24” minimum snow depth for the Herring Creek area
12 and other meadows occupied by the species predicted to have at least moderate OSV use, the Forest
13 Service did not take a hard look at the effects of the OSV designations on Sierra Nevada yellow-
14 legged frog and Yosemite toad.

15 3. Near Natural Areas

16 Although the Stanislaus Forest Plan has prohibited all motorized use in Near Natural Areas
17 for years, the Forest Service amended the Forest Plan to allow OSV use in such areas. In doing so, it
18 failed to take a hard look at impacts to these natural, semi-primitive areas and the imperiled species
19 that inhabit them.

20 The ROD amended the Forest Plan to designate 25,122 acres for OSV use within the Eagle
21 and Pacific Valley Near Natural Areas. In analyzing effects of OSV use in Near Natural Areas, the
22 Forest Service relied on OSV-use levels, which were categorized as high, moderate, and low use.
23 AR 000418. These use categories “were developed . . . based on staff observations and known use
24 patterns” and “historically observed maximum use patterns.” *Id.* But the Forest Service did not
25 consider how use levels may change based on the OSV designations in the Stanislaus plan. Instead,
26 the Forest Service only looked at pure acreage in calculating the change in OSV use in Near Natural
27 Areas. For example, the FEIS states that “there is a 14.5 percent decrease in the popular, highly
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1 desirable public, cross-country OSV areas available under current management.” AR 000471. But
2 this method of reasoning—one that focuses simply on changes in acreage and does not consider
3 potential changes in volume of use—ignores two important factors.

4 First, the baseline that the Forest Service relied on is based off of historic, *illegal* use since
5 the Forest Plan previously prohibited motorized use in Near Natural Areas. *See* AR 000358.
6 Indeed, previous winter recreation maps and signs at trailheads showed these areas as closed to
7 motorized use. AR 011156; AR 015053; AR 015057; Page Decl. ¶¶ 7–9 (filed herewith). The
8 agency did not consider that by amending the Forest Plan to make OSV use *legal* and showing parts
9 of the Pacific Valley and Eagle Near Natural areas as open to OSV use on the new winter travel
10 map, there will likely be a resulting increase in OSV use in those areas. Second, the Forest Service
11 did not consider that by reducing the overall amount of “highly desirable” Near Natural and
12 Proposed Wilderness areas open for OSV use (compared to the illegal, baseline use), the use in the
13 designated Eagle and Pacific Valley Near Natural Areas is likely to increase compared to past
14 levels. *See* AR 004765, AR 005206, AR 005975 (public comments requesting that the Near Natural
15 Areas be open to OSV use); AR 003656, 3687, 3731 (Recreation Report noting past OSV use in
16 multiple Near Natural, Proposed Wilderness, and Special Interest areas that are “popular, highly
17 desirable areas” and 29% reduction in such use under new plan); AR 000009 (ROD noting
18 commenters stated Near Natural areas provide “unique, highly desirable, and remote OSV use
19 opportunities not occurring elsewhere on the forest”). It was thus arbitrary and capricious for the
20 Forest Service to assume OSV use in Near Natural areas under the preferred alternative would
21 decrease. By failing to adequately predict and evaluate the likely volume of OSV use in the Pacific
22 Valley and Eagle Near Natural Areas, the Forest Service failed to take a “hard look” at the effects of
23 its OSV designations. *See Montana Wilderness Ass’n*, 666 F.3d at 558.

24 This flawed assessment of impacts from designating OSV use in the two Near Natural Areas
25 also has implications for wildlife. The Forest Service did not provide concrete information about
26 where occupied or suitable habitat of species occurs in relation to OSV designations within Near
27 Natural Areas, instead listing overlap in terms of percentages or total acreage. AR 000535–36,
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546–47; AR 000036. This is particularly problematic given the importance of Near Natural Areas for imperiled species. *See* AR 000343 (EIS admitted OSV use in Near Natural areas could significantly impact habitat for red fox and marten); AR 005235 (“The roadless Near Natural area contains a proven population of marten based on CSERC and FS photo-detection stations.”); AR 004632 (noting OSV activity in the Eagle Peak/Meadow and Pacific Valley Near Natural Areas could limit expansion of Sierra Nevada red fox population); AR 010594–95 (marten documented from photo-stations in and around Pacific Valley Near Natural area). The failure to provide concrete information about the location of habitat within OSV-designated Near Natural Areas shows the Forest Service did not take a hard look at the impacts of designating those areas.

Montana Snowmobile Ass’n, 790 F.3d at 925.

B. The winter travel plan did not minimize impacts to wildlife and wildlife habitat under the Travel Management Rule.

As discussed above, the Travel Management Rule requires the Forest Service to minimize harassment of wildlife or significant disruption of wildlife habitats when designating areas and trails for OSV use in winter travel plans. 36 C.F.R. § 212.55(b). This mandate demands more than the agency simply “considering” the criteria during the designation process; it must actually use the data it compiled to show how it designed the areas and trails open to snowmobile use with the objective of minimizing harm. *Montana Snowmobile Ass’n*, 790 F.3d at 932 (citing cases); *Cent. Sierra Env’t Res. Ctr.*, 916 F.Supp.2d at 1096. To do so, it cannot rely simply on reductions in total areas open to OSVs, it must analyze each area and trail and locate them in places that are meant to minimize harassment of wildlife and disruption of wildlife habitat. *Cent. Sierra Env’t Res. Ctr.*, 916 F.Supp.2d at 1096; *Friends of the Clearwater*, 2022 WL 768836, at *8–11. Mitigation measures can help reduce impacts but do not substitute for the requirement to minimize impacts when initially locating routes and areas. *WildEarth Guardians v. Jeffries*, 370 F.Supp.3d at 1249–51 (stating that mitigation measures may reduce impacts but do not substitute for requirement to minimize impacts when *locating* routes).

Here, the Forest Service conducted a separate analysis to apply the minimization criteria to its OSV area and route designations, which largely resulted in rational designations that complied

1 with the Travel Management Rule. *See* AR 000153–279; AR 000349–52. But the agency failed to
2 demonstrate how its designations minimized harm to the four imperiled species discussed above.

3 First, the agency did not minimize harassment of, or disruption of habitat for Sierra Nevada
4 yellow-legged frog and Yosemite toad because it located OSV trails and areas near the most
5 important populations of those species, and failed to impose a 24” snow depth for all sites they
6 occupy. Both species are endemic to the Sierra Nevada mountains and have declined significantly,
7 leading to being listed as threatened (toad) and endangered (frog). AR 003789, 3791, 3792, 3794–
8 95. They are found in multiple sites on the Stanislaus that are isolated from each other, with most
9 sites of each species containing a small number of individuals. AR 003847–48, 3851–54. Because
10 the remaining populations are so small and isolated, they are vulnerable to stochastic events and
11 inbreeding. AR 003791–92, 3794–95; AR 003875 (“these are small populations at risk of localized
12 extirpation if sufficient individuals are killed”). The largest population of Sierra Nevada yellow-
13 legged frog on the forest is found at Stanislaus Meadow, while the largest numbers of toads are
14 found in the Highland Lakes and Herring Creek areas. AR 003847–48, 3852–54.

15 The Forest Service designated OSV use areas that encompass all three of these sites, and
16 designated trails that run through the middle of Stanislaus Meadow and adjacent to meadows in the
17 Highland Lakes and Herring Creek complexes. AR 003875, 3878, 3880, 3887–91. It did so despite
18 admitting that the biggest risks to the frog and toad were associated with designated trails and cross-
19 country areas with moderate use levels. AR 003863. All three of these areas are expected to have
20 moderate to high OSV use levels and designated trails that will facilitate that use. AR 000362; AR
21 003847–48, 3853–54, 3866; AR 003801–02, 3805; AR 000419; AR 003660 (trails facilitate
22 meadow use). For Stanislaus Meadow and Highland Lakes, the Forest Service admitted that these
23 areas receive concentrated use, which may increase compared to prior levels. AR 003863, 3875.
24 But it claims that it minimized harm to these species by imposing the 24” snow depth and
25 monitoring requirements. AR 003864, 3867, 3875. For other occupied sites, the agency
26 claims a 12” snow depth is sufficient because OSV use levels are low. AR 003863–64, 3866–67.

1 Three problems arise from the Forest Service's conclusion. First, the agency cannot
2 substitute mitigation for actually locating trails and areas in places that will minimize harm.
3 *WildEarth Guardians v. Jeffries*, 370 F.Supp.3d at 1249–51. By locating OSV trails and areas that
4 overlap the most important sites with the largest populations of Sierra Nevada yellow-legged frog
5 and Yosemite toad—after admitting that those areas are expected to have moderate to high OSV
6 use—the Forest Service failed to properly apply the minimization criteria. Second, even assuming
7 the agency could rely solely on mitigation to comply with the criteria, it was unreasonable to not
8 order a 24" snow depth for other occupied sites that have moderate OSV use, especially the
9 important Herring Creek area. *See* AR 003801–02; AR 003853–54 (moderate OSV use at Summit
10 Lake frog site and Niagara Creek Meadow, multiple Herring Creek meadows, Tryon Meadow and
11 Bear Tree Meadow toad sites). In fact, U.S. Fish and Wildlife Service stated that *the most* at-risk
12 populations of Yosemite toad were in the Herring Creek area, yet those meadows do not have a 24"
13 snow depth requirement. AR 003805; *see also* AR 003866 (Forest Service stating that greatest risk
14 for toad was at Highland Lakes *and* Herring Creek). Additionally, OSV trails and areas with
15 moderate or high use overlap designated critical habitat for both species, habitat that is essential for
16 the conservation of the species, but only critical habitat at Stanislaus Meadow and Highland Lakes
17 has the 24" snow depth requirement. AR 003802–04. Third, reliance on a 12" snow depth
18 requirement for other occupied sites that are expected to have low OSV use is also unreasonable
19 when these sites have very small populations that are isolated and loss of individual frogs or toads
20 could lead to extirpation of those populations. If the areas will not receive much OSV use, having a
21 more protective snow depth requirement will not significantly impact OSV use. Given the minimal
22 burden on OSV use and a substantial benefit to the species, the Forest Service did not rationally
23 apply the minimization criteria to these smaller occupied sites.

24 The Forest Service's application of the minimization criteria was also unreasonable
25 regarding OSV designations in Sierra Nevada red fox and Pacific marten habitat. As discussed
26 above, the record does not establish that the Forest Service avoided locating OSV trails and areas
27 within habitat known to be used by the red fox or marten because it did not even identify where that
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1 occupied habitat exists on the forest. While the record is missing years of location data for fox and
2 marten that the agency possesses, it does contain some location data for the fox. AR 0034600–27.
3 Based on this limited data, the Forest Service admits this very small population of fox occurs “near”
4 Sonora Pass but does not display where that is in relation to the OSV designations, particularly the
5 Sonora Pass OSV play area. AR 004088–89, 4095–98. Allowing a high-use OSV play area to
6 overlap critically important habitat for this highly endangered species indicates the Forest Service
7 did not locate OSV areas with the objective of minimizing harassment of red fox and disruption of
8 its habitat. Similarly, the Forest Service mentions three areas where marten were found on the
9 forest, but does not display those areas or where OSV designations occur in relation to them. AR
10 004076–77, 4081–84. Comments indicate that marten and fox have been detected in and around the
11 Pacific Valley and Eagle Near Natural Areas, but the Forest Service opened those areas to OSV use
12 without assessing if either species has been found there or if OSV use will increase once designated
13 open on the winter travel map. *See supra* pp. 26–27.

14 Like with the frog and toad, relying on the seasonal use restriction at Sonora Pass as
15 mitigation for the fox cannot substitute for the initial requirement of locating OSV areas in a way
16 that minimizes harm. Furthermore, the seasonal use restriction was not a rational mitigation
17 measure when the fox’s breeding season begins as early as December and the experts studying this
18 species strongly urged an earlier closure. AR 004631. The Forest Service claims snow compaction
19 that could lead to coyote intrusion is less of a concern before mid-April due to regular snowfall, AR
20 000012, but that assertion fails to address the *other risks* OSV use poses to foxes during this
21 sensitive life history stage, such as displacing foxes from preferred den sites or impairing breeding
22 success by disturbing pregnant or nursing females. AR 004631, AR 004091–92. Moreover, OSV
23 use could be extended until the end of April, further reducing the effectiveness of the seasonal
24 closure. AR 000006-7. And although SSF claims that the science cited by the agency does not
25 prove OSVs impact red fox, SSF Brief at 26–30, science on impacts to wildlife is rarely definitive.
26 The agency’s discussion of potential impacts, combined with advice from the researchers studying
27 this very population of fox, support the need to minimize harm to the species given its precarious
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1 status of low abundance and low genetic diversity. Yet, by designating the Sonora Pass OSV play
2 area, the Forest Service failed to comply with that requirement.

3 **C. The Forest Service violated NFMA’s requirement to show the Forest Plan**
4 **Amendment maintained and restored rare wildlife.**

5 In order to allow OSV use within any Near Natural Areas, the Forest Service had to amend
6 its Forest Plan. AR 000007. Forest Service regulations governing forest planning set forth multiple
7 substantive requirements for Forest Plans encompassing sustainability, diversity of plant and animal
8 communities, multiple uses, and timber requirements that are intended to maintain or restore
9 ecological integrity and ecosystem diversity in national forests while preserving forests for multiple
10 uses. *Wild Virginia v. U.S. Forest Serv.*, 24 F.4th 915, 921 (4th Cir. 2022) (citing 77 Fed. Reg.
11 21,162 (Apr. 9, 2012); 36 C.F.R. §§ 219.8-219.11). When amending a Forest Plan, the agency must
12 determine which of these substantive requirements are “directly related” to the plan direction being
13 added, modified, or removed by the amendment and apply such requirements within the scope and
14 scale of the amendment. *Id.*; 36 C.F.R. § 219.13(b)(5). Here, the Forest Service determined the
15 following substantive requirements are directly related to the Plan amendments: (1) Sustainability:
16 Ecological Sustainability (36 C.F.R. § 219.8(a)(1)); (2) Sustainability: Economic and Social
17 Sustainability (36 C.F.R. § 219.8(b)); (3) Diversity of Plant and Animal Communities: Ecosystem
18 Diversity (36 C.F.R. § 219.9(a)(2)(ii)); and (4) Multiple Use: Integrated Resource Management for
19 Multiple Use (36 C.F.R. § 219.10(a)(1),(6),(7) & (10)). AR 000355–56, 407.

20 To apply the ecological sustainability and plant and animal diversity requirements, the
21 agency must show that the amendments “maintain or restore the ecological integrity of terrestrial
22 and aquatic ecosystems and watersheds in the plan area.” 36 C.F.R. §§ 219.8(a)(1), 219.9(a)(1);
23 *Wild Virginia*, 24 F.4th at 931. In particular, for sustainability, the plan amendments must maintain
24 or restore structure, function, composition, and connectivity of riparian areas, taking into account
25 aquatic and terrestrial habitats. 36 C.F.R. § 219.8(a)(3)(i)(D). With regard to diversity of plant and
26 animal communities, the plan amendments must maintain or restore rare aquatic and terrestrial plant
27 and animal communities, including by providing ecological conditions necessary to contribute to
28 recovery of ESA-listed species, conserve ESA candidate species, and maintain viable populations of

1 species of conservation concern. *Id.* § 219.9(a)(2)(ii), (b). To comply with these substantive
2 requirements, the Forest Service must adequately analyze all relevant impacts and demonstrate that
3 the Plan amendments will maintain and restore aquatic and terrestrial habitats and rare animal
4 communities; it cannot simply rely on the notion that the amendment will affect only a small
5 portion of the forest and protections will continue elsewhere. *Wild Virginia*, 24 F.4th at 931–32.

6 Here, the ROD amended the Stanislaus Forest Plan to allow the agency to designate OSV
7 use in Near Natural Areas and other non-motorized areas if done in accordance with the Travel
8 Management Rule. AR 000007; AR 000406. After finding a number of the 2012 planning rule’s
9 substantive requirements were directly related to that amendment, the Forest Service analyzed
10 whether the amendments would “cause a substantial adverse impact to a specific species, or . . .
11 would substantially lessen protections for a specific species.” AR 000406, 408. For Sierra Nevada
12 yellow-legged frog and Yosemite toad, the agency reasoned that OSV use in Near Natural and
13 Proposed Wilderness areas could overlap with suitable and potentially occupied habitat, but because
14 the species overwinter under the snow and minimum snow depth requirements would ensure that
15 OSV use does not occur when the species are breeding, the risk to the species “is less than
16 substantial.” AR 000408–09.

17 For Pacific marten and red fox, the Forest Service likewise stated that OSV use in Near
18 Natural and Proposed Wilderness areas could overlap with suitable and potentially occupied habitat.
19 AR 000409–10. But it stated that the risk to marten was “less than substantial” because less than
20 14% of suitable marten habitat on the forest occurs in Near Natural and Proposed Wilderness areas,
21 and little OSV use occurs in marten habitat due to the high density of trees. *Id.* For Sierra Nevada
22 red fox, it concluded the risk from allowing OSV use in Near Natural and Proposed Wilderness
23 areas is “less than substantial” because OSV use and fox activity occur at different times of day,
24 OSVs will not impair fox habitat, the Forest Service minimized the proportion of land designated
25 for OSV use within suitable and occupied habitat, and a seasonal OSV closure eliminated use
26 during the majority of the fox’s denning period within the Sonora Pass area. AR 000410.

27 The Forest Service’s application of the planning rule’s substantive requirements was flawed
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1 because it used an incorrect legal standard, and the facts fail to show conformance with the correct
2 standard. The agency’s standard—whether the amendments would cause a substantial adverse
3 impact or substantially lessen protections for a specific species—was recently rejected as the
4 appropriate standard by the Fourth Circuit. *Wild Virginia*, 24 F.4th at 931. As the Court stated,
5 “the 2012 Planning Rule does not demand that the amendments protect forest resources without
6 substantial lessening of protections. Rather, a forest plan ‘must include . . . components . . . to
7 *maintain or restore* the ecological integrity of terrestrial and aquatic ecosystems and watersheds in
8 the plan area.’” *Id.* (emphasis in original). By using the same incorrect standard here, rather than
9 the proper “maintain or restore” standard, the Forest Service’s application of the substantive
10 requirements was legally flawed.

11 Second, for the reasons discussed throughout this brief, the facts do not support conclusions
12 that allowing OSV use in Near Natural Areas will maintain or restore communities of these four
13 imperiled species. The EIS did not identify the species’ occupied or denning habitat within the
14 Near Natural Areas based on known detections and the proximity of OSV designations. For the
15 frog and toad, the EIS failed to describe if any habitat occurs in or close to Near Natural Areas, even
16 though Stanislaus Meadow and Highland Lakes are in or near the Pacific Valley Near Natural Area
17 and contain some of the largest populations of the species. AR 000504–10. For marten and red fox,
18 the EIS summarized total acres of habitat within the Near Natural Areas open to OSV use and the
19 level of OSV use. AR 000536, 546–47. But the agency failed to assess where those OSV
20 designations overlapped or were adjacent to *occupied* habitat, which is the most important habitat
21 for the species, or whether OSV use in these areas would increase compared to the past unlawful
22 use. Indeed, data supplied to the Forest Service showed the Pacific Valley and Eagle Near Natural
23 Areas are used by one or both species. *See supra* pp. 26–27. By not considering all relevant effects
24 of designating OSV use in Near Natural Areas, the agency did not show it met Forest Plan
25 substantive requirements for wildlife diversity. *Wild Virginia*, 24 F.4th at 931–32.

26 Additionally, for threatened and endangered species that consist of mainly very small,
27 isolated populations, any impacts that injure or kill individual members or impair reproductive
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1 success would be highly detrimental and would not “maintain or restore” the communities of those
 2 rare species. This is particularly true for the red fox DPS, which is already below a viable level and
 3 must increase in abundance just to survive. As discussed above, the Forest Service has not shown
 4 that its mitigation for the frog and toad (snow depth minimums) and red fox (seasonal use
 5 restriction at Sonora Pass) are sufficient to protect these populations from all adverse effects caused
 6 by OSV use in their occupied habitat, particularly during the breeding season.

7 In sum, the Forest Service’s use of an improper legal standard and failure to demonstrate
 8 OSV designations in Near Natural Areas will contribute to maintaining and restoring Sierra Nevada
 9 yellow-legged frog, Yosemite toad, Sierra Nevada red fox, and Pacific marten warrants a
 10 supplemental analysis for the agency’s Forest Plan amendment.

11 **III. ANY REMEDY SHOULD LEAVE THE WINTER TRAVEL PLAN IN PLACE** 12 **WHILE THE AGENCY SUPPLEMENTS ITS ANALYSIS.**

13 Although vacatur is the presumed remedy where an agency has acted unlawfully, when
 14 equity demands, the agency action may be “left in place while the agency reconsiders or replaces
 15 the action, or to give the agency time to follow the necessary procedures.” *All. for the Wild Rockies*
 16 *v. Tidwell*, 907 F.3d 1105, 1121 (9th Cir. 2018) (citing *Humane Soc’y of U.S. v. Locke*, 626 F.3d
 17 1040, 1053 n.7 (9th Cir. 2010)). To determine whether vacatur is warranted, courts “weigh the
 18 seriousness of the agency’s errors against the disruptive consequences of an interim change that may
 19 itself be changed.” *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir.
 20 2015) (internal quotation marks and citation omitted). *See also Allied-Signal, Inc. v. U.S. Nuclear*
 21 *Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). “Put differently, courts may decline to
 22 vacate agency decisions when vacatur would cause serious and irreparable harms that
 23 significantly outweigh the magnitude of the agency’s error.” *AquaAlliance v. U.S. Bureau of*
 24 *Reclamation*, 312 F. Supp. 3d 878, 881 (E.D. Cal. 2018) (internal quotation marks omitted).

25 Here, the disruptive consequences of vacatur vastly outweigh the seriousness of the Forest
 26 Service’s errors. While the Forest Service’s legal violations are indeed serious, they are limited in
 27 scope and involve primarily narrow geographic areas. The majority of the OSV designations in the
 28 Plan are not being challenged by either party, and on remand the Forest Service need only

1 reconsider the disputed designations. Thus, this factor weighs against vacatur. *See WildEarth*
2 *Guardians v. Steele*, 545 F.Supp.3d 855, 884–85 (D. Mont. 2021) (no vacatur when legal violations
3 were relatively limited and on remand the agency was unlikely to reach a different result as to the
4 plan *as a whole*).

5 The disruptive consequences that would occur if the plan were vacated also weigh against
6 vacatur. This is the first winter travel plan for the Stanislaus. If this plan is vacated, there is no plan
7 to revert back to and the forest would return to largely unregulated OSV use. Thus, the harm of
8 vacating the plan outweighs the harm of the plan remaining in place while the agency reconsiders
9 aspects of its analysis. There are four imperiled species that inhabit the Stanislaus, including species
10 listed as endangered and threatened under the ESA. Even considering the deficiencies in the plan,
11 regulated OSV use is leagues better for these species—and the environment on the forest as a
12 whole—than if the plan were vacated and the forest returned to unregulated use, for instance
13 allowing more extensive OSV use in the Sonora Pass area all season. *See Idaho Farm Bureau*
14 *Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (no vacatur when risk of potential harm to
15 endangered species would be greater if agency decision was vacated); *Steele*, 545 F.Supp.3d at 885
16 (“The potential disruptive effects on the environment, local communities, and wildlife are also
17 relevant considerations.”). *Cf. Pollinator Stewardship Council*, 806 F.3d at 532 (vacating agency
18 action when leaving it in place risked more environmental harm than vacating it).

19 Seven years have already passed since the Travel Management Rule was amended to require
20 the Forest Service to do winter travel planning. If the Plan is vacated now, it could be many more
21 years until another plan is put in place and the Forest Service is in compliance with the Rule.
22 Similarly, this Plan is in response to a settlement agreement that set a deadline for the Forest
23 Service to complete a winter travel plan for the Stanislaus. That deadline has already been
24 exceeded. Because vacating the current winter travel plan would be disruptive for the environment
25 and sensitive wildlife, and the legal errors in the Plan are relatively limited in scope, the Plan should
26 continue to be implemented while the agency supplements its analysis.

1 Dated: July 29, 2022

Respectfully submitted,

3 /s/ Jessica L. Blome

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which in turn automatically generated a Notice of Electronic Filing to all parties in the case who are registered users of the CM/ECF system, causing the following counsel to be served by electronic means:

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Dated: July 29, 2022

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