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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 REPLY TO CROSS MOTION
FOR SUMMARY JUDGMENT ON
PLAINTIFFS' CLAIMS AND 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

INTRODUCTION	1
ARGUMENT	2
I. THE EIS DID NOT ADEQUATELY ANALYZE EFFECTS TO WILDLIFE FROM THE OSV DESIGNATIONS, IN VIOLATION OF NEPA.	2
A. Sierra Nevada Red Fox and Pacific Marten	3
B. Sierra Nevada Yellow-Legged Frog and Yosemite Toad	7
C. Near Natural Areas	10
II. THE RECORD DOES NOT SHOW THE FOREST SERVICE MINIMIZED IMPACTS TO WILDLIFE UNDER THE TRAVEL MANAGEMENT RULE.....	11
III. THE FOREST SERVICE USES AN INCORRECT INTERPRETATION OF ITS REGULATIONS TO JUSTIFY ITS FOREST PLAN AMENDMENT.	19
IV. SSF’S CLAIMS OVER THE 12” MINIMUM SNOW DEPTH ARE NOT SUPPORTED BY THE RECORD.....	22
V. THE APPROPRIATE REMEDY IS REMAND WITHOUT VACATUR.....	24
CONCLUSION	25
CERTIFICATE OF SERVICE.....	27

TABLE OF AUTHORITIES

CASES

<i>Bark v. U.S. Forest Serv.</i> , 958 F.3d 865 (9th Cir. 2020)	2
<i>Cal. Cmities. Against Toxics v. U.S. Env’t Prot. Agency</i> , 688 F.3d 989 (9th Cir. 2012)	25
<i>California v. Block</i> , 690 F.2d 753 (9th Cir. 1982)	3
<i>Cascade Forest Conservancy v. U.S. Forest Serv.</i> , 577 F. Supp. 3d 1163 (W.D. Wash. 2021), <i>aff’d</i> 2022 WL 10964667 (9th Cir. Oct. 19, 2022)	20
<i>Cascade Forest Conservancy v. U.S. Forest Serv.</i> , No. 22-35087, 2022 WL 10964667 (9th Cir. Oct. 19, 2022)	20
<i>Christopher v. SmithKline Beecham Corp.</i> , 567 U.S. 142 (2012)	19
<i>Ctr. for Biological Diversity v. BLM</i> , 746 F. Supp. 2d 1055 (N.D. Cal. 2009)	12
<i>Ctr. for Biological Diversity v. Gould</i> , 150 F. Supp. 3d 1170 (E.D. Cal. 2015)	9
<i>Ctr. for Env’t Law and Policy v. U.S. Bureau of Reclamation</i> , 715 F. Supp. 2d 1185 (E.D. Wash. 2010)	10
<i>Ecology Ctr. v. Castaneda</i> , 574 F.3d 652 (9th Cir. 2009)	4
<i>Friends of the Clearwater v. Probert</i> , No. 3:21-cv-56-BLW, 2022 WL 768836 (D. Idaho March 12, 2022)	11
<i>Humane Soc’y of the United States v. Locke</i> , 626 F.3d 1040 (9th Cir. 2010)	2, 19
<i>Idaho Conservation League v. Guzman</i> , 766 F. Supp. 2d 1056 (D. Idaho 2011)	12
<i>Idaho Farm Bureau Fed’n v. Babbitt</i> , 58 F.3d 1392 (9th Cir. 1995)	25
<i>League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton</i> , No. 3:12-cv-2271-HZ, 2014 WL 6977611 (Dec. 9, 2014)	8
<i>N. Alaska Env’t Ctr. v. Kempthorne</i> , 457 F.3d 969 (9th Cir. 2006)	23
<i>Neighbors of Cuddy Mtn. v. U.S. Forest Serv.</i> , 137 F.3d 1372 (9th Cir. 1998)	10
<i>Nw. Env’t Defense Center v. Nat’l Marine Fisheries Serv.</i> , 647 F. Supp. 2d 1221 (D. Or. 2009) ...	10
<i>Or. Nat. Desert Ass’n v. Jewell</i> , 840 F.3d 562 (9th Cir. 2016)	3
<i>Or. Nat. Res. Council Fund v. Goodman</i> , 505 F.3d 884 (9th Cir. 2007)	2
<i>Pacific Coast Fed’n of Fishermen’s Ass’ns v. Blank</i> , 693 F.3d 1084 (9th Cir. 2012)	23
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989)	3, 9
<i>Sierra Nevada Forest Prot. Campaign v. Weingardt</i> , 376 F. Supp. 2d 984 (E.D. Cal. 2005)	8

1	<i>Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.</i> , 565 F.3d 545 (9th Cir. 2009).....	2
2	<i>Tennessee Valley Authority v. Hill</i> , 437 U.S. 153 (1978).....	25
3	<i>Western Watersheds Project v BLM</i> , No. 13-cv-1028-PGR, 2015 WL 846548 (D. Ariz. Feb. 26,	
4	2015).....	24
5	<i>Wild Virginia v. U.S. Forest Serv.</i> , 24 F.4th 915 (4th Cir. 2022).....	20, 21
6	<i>WildEarth Guardians v. Jeffries</i> , 370 F. Supp. 3d 1208 (D. Or. 2019).....	5, 12
7	<i>WildEarth Guardians v. Montana Snowmobile Ass'n</i> , 790 F.3d 920 (9th Cir. 2015)	passim
8	<i>WildEarth Guardians v. Steele</i> , 545 F. Supp. 3d 855 (D. Mont. 2021)	24

9
10 **STATUTES**

11	5 U.S.C. § 706(2).....	2
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12 **REGULATIONS**

13	36 C.F.R. § 212.55(b).....	12
14	36 C.F.R. § 219.13(b)(5)	19, 20, 21
15	40 C.F.R. § 1500.1(b).....	7
16	40 C.F.R. § 1502.14.....	3
17	40 C.F.R. § 1502.21.....	8
18	40 C.F.R. § 1502.24.....	7
19	40 C.F.R. § 1508.8(b).....	10

20
21 **FEDERAL REGISTER**

22	46 Fed. Reg. 18026 (March 23, 1981).....	8
23	81 Fed. Reg. 90,723 (Dec. 15, 2016).....	20

INTRODUCTION

Defendant U.S. Forest Service responds to Defendant-Intervenors WildEarth Guardians and California Wilderness Coalition's ("Guardians") cross claims with the typical mantra that the Court should simply defer to the agency's conclusions regarding the impacts to wildlife from the Stanislaus winter travel plan's over-snow vehicle ("OSV") designations. But such deference is only appropriate where the record establishes there is evidence and a rational explanation in support. Here, the record shows the Forest Service failed to consider important information and offered conclusions inconsistent with facts in the record. Notably, its response ignored numerous points in Guardians' opening brief that demonstrated inconsistent or unsupported conclusions the agency made regarding OSV impacts to Sierra Nevada red fox, Pacific marten, Sierra Nevada yellow-legged frog, and Yosemite toad. Furthermore, the agency offers an erroneous post hoc interpretation of its 2012 Forest planning regulations that contradicts the language of the regulations, cases interpreting that language, and the record in this case. If this Court digs into the record and carefully reviews the agency's reasoning, as it must when reviewing claims under the Administrative Procedure Act ("APA"), it will find that the Stanislaus winter travel plan and supporting Environmental Impact Statement ("EIS") violate the National Environmental Policy Act ("NEPA"), Forest Service Travel Management Rule, and National Forest Management Act ("NFMA").

With respect to Plaintiff Sierra Snowmobile Foundation's ("SSF") claims, Guardians agrees with the Forest Service that the 12" minimum snow depth requirement was in place prior to the winter travel plan for both cross country and trail use based on the information in the record. It was thus reasonable for the agency to consider an overall 12" minimum snow depth as part of the environmental baseline, and a necessary component of all alternatives in the EIS to ensure the plan conformed with the Travel Management Rule. Finally, if the Court does find any legal violations here, it should simply order the agency to conduct further analysis while keeping the plan in place in the interim given the very limited scope of SSF's claims, the request by Guardians to *not* vacate the decision, and the disruption and harm to resources that would result from vacatur of the decision.

ARGUMENT

All parties agree that SSF's and Guardians' claims here are reviewed under the APA, whereby the Court determines if the agency's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2). Under this standard, the *scope* of the Court's review is narrow, but the *depth* of its analysis is not: the APA "requires . . . court[s] to engage in a substantial inquiry, a thorough, probing, in-depth review" of the agency action to ensure that the agency has provided adequate and reasonable justifications for its conclusions and decision. *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 554 (9th Cir. 2009) (cleaned up). This Court must find that the agency's analysis "articulate[d] a rational connection between the facts found and the conclusions made." *Or. Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007). An agency cannot rely on conclusory statements that are based on vague and uncertain analysis. *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 872 (9th Cir. 2020). Nor can an agency rely on post hoc rationalizations that are raised in litigation but were not actually relied upon for the agency's decision. *Humane Soc'y of the United States v. Locke*, 626 F.3d 1040, 1049-50 (9th Cir. 2010).

A careful review of the record here shows numerous holes in the Forest Service's arguments in response to Guardians' claims. The agency ignores key facts in the record that undermine its conclusions, and makes assertions that are not supported by evidence in the record with respect to Guardians' wildlife-focused claims. Accordingly, it has not demonstrated a rational connection between the facts in the record and its conclusions about impacts to wildlife from the OSV designations. In contrast, the record supports the Forest Service's argument that a 12" minimum snow-depth requirement for OSV cross country and trail use was the status quo before the winter travel plan and is needed in all alternatives to ensure compliance with the Travel Management Rule. Thus, the Court should grant Guardians' motion and deny SSF's motion for summary judgment.

I. THE EIS DID NOT ADEQUATELY ANALYZE EFFECTS TO WILDLIFE FROM THE OSV DESIGNATIONS, IN VIOLATION OF NEPA.

Guardians' NEPA claims are not mere "flyspecking" as the Forest Service asserts but, rather, go to the very heart of NEPA analyses. The point of NEPA is to ensure the agency has

1 considered all relevant data and accurately assessed the effects of a proposed action, and disclosed
 2 that information to the public in the EIS. 40 C.F.R. § 1502.14; *Robertson v. Methow Valley Citizens*
 3 *Council*, 490 U.S. 332, 349 (1989) (agency must “carefully consider” potential environmental
 4 impacts and make that information available to the public); *Or. Nat. Desert Ass’n v. Jewell*, 840
 5 F.3d 562, 570 (9th Cir. 2016) (analysis in EIS must be based on “accurate information and
 6 defensible reasoning”); *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (site-specific impacts
 7 must be “fully evaluated”). The agency failed to fulfill those duties here.

8 **A. Sierra Nevada Red Fox and Pacific Marten**

9 The Forest Service failed to take a “hard look” at the impacts of OSV use on the imperiled
 10 Sierra Nevada red fox and Pacific marten because it did not assess the impacts of OSV use to the
 11 habitat most important to the species: the habitat they actually occupy. Additionally, it failed to take
 12 into account important input from the leading Sierra Nevada red fox scientists, which undermined
 13 its OSV use designations and seasonal closure in the Sonora Pass area.

14 The Forest Service claims that its analysis focused on the effects of OSV use to the fox and
 15 marten’s suitable habitat, “subsuming” known occurrences and occupied habitat as part of its
 16 analysis. Def. Br. at 26–27. This reasoning is flawed and entirely misses Guardians’ point that
 17 occupied habitat is the most important habitat for these species with small, struggling populations,
 18 and therefore deserves its own discrete analysis of impacts.

19 As the Forest Service admits, the habitat that the fox and marten actually occupy is only a
 20 small fraction of their suitable habitat. Def. Br. at 27. For instance, all sightings of the red fox in
 21 recent years have been at elevations above 8,900 feet, but the Forest Service’s definition of suitable
 22 habitat includes all habitat over 8,000 feet. *Id.*; AR 000540–41; *see also* AR 004088–89, 004090
 23 (the fox population is small and concentrated around Sonora Pass). Similarly, sightings of the
 24 marten have been concentrated around three known areas on the forest with only one known den
 25 site. AR 004076–77, AR 000532. While addressing impacts to suitable habitat is indeed important,
 26 the impacts to the areas the species actually occupy are the most critical because those are the
 27 impacts with the greatest possibility of directly harming the species. By overgeneralizing its
 28 analysis to consider occupied habitat as part of all suitable habitat, the Forest Service improperly

1 avoided analysis of the most significant impacts. *See* AR 004631 (fox expert comments that “OSV
 2 use in the vicinity of den sites could be especially problematic”), AR 003808 (biological opinion
 3 conclusion that adverse effects of OSV use “are most likely to occur where high or moderate OSV
 4 use overlaps occupied Sierra Nevada yellow-legged frog or Yosemite toad habitat.”).

5 Contrary to the Forest Service’s framing of Guardians’ argument, this is very much a matter
 6 of substance, not just format. Def. Br. at 30. For the public to understand where the most significant
 7 impacts to these imperiled species are likely to occur, the agency must disclose the location of
 8 occupied habitat and its relation to the OSV designations.¹ Mere percentage of habitat overlap with
 9 OSV designations is insufficient. For example, the “zone of influence” calculation looks only at the
 10 percentage of suitable habitat within a certain distance of a known species occurrence that has OSV
 11 use (five miles from known fox locations and 400 meters from “preferred or occupied” marten
 12 habitat). AR 000545 (Table 54); AR 000534 (Table 49). But the public has no way of knowing
 13 where those locations or occupied habitat occur in relation to the OSV designations.

14 The agency has location data for these species, and in fact demonstrated that it was capable
 15 of providing maps with the locations of occupied habitat in relation to suitable habitat by doing so
 16 for the Sierra Nevada yellow-legged frog and Yosemite toad. *See* AR 000488, 000490 (frog and
 17 toad habitat maps showing occupied habitat is a small fraction of suitable habitat). Its failure to
 18 disclose the areas used by the fox and marten and their locations in relation to the OSV designations
 19 was unreasonable and violated NEPA. *WildEarth Guardians v. Montana Snowmobile Ass’n*, 790
 20 F.3d 920, 925 (9th Cir. 2015) (“To fulfill NEPA’s public disclosure requirements, the agency must
 21 provide to the public ‘the underlying environmental data’ from which the Forest Service develops
 22 its opinions and arrives at its decisions.” (cleaned up)); *Ecology Ctr. v. Castaneda*, 574 F.3d 652,
 23 667 (9th Cir. 2009) (“NEPA requires that the Forest Service disclose the hard data supporting its
 24 expert opinions to facilitate the public’s ability to challenge agency action.”) (cleaned up)).

25
 26
 27 ¹ The Forest Service’s attempt to distinguish *WildEarth Guardians v. Montana Snowmobile*
 28 *Association* fails. Def. Br. at 30. Just like in *Montana Snowmobile Association*, here, the location of
 areas and trails in relation to occupied habitat goes directly to the substance of the Forest Service’s
 impacts analysis, not simply form. 790 F.3d 920, 926 (9th Cir. 2015). As the Ninth Circuit said in
 that case, “geography matters.” *Id.*

1 Relatedly, the Forest Service responds to its failure to consider the data from Central Sierra
 2 Environmental Resource Center (“CSERC”) documenting multiple years’ worth of detections of
 3 both the marten and fox by insisting that such data was effectively included in its analysis of effects
 4 on suitable habitat. Def. Br. at 31. This data, which reveals the red fox and marten’s use of the
 5 Sonora Pass area, Pacific Valley Near Natural Area, and Eagle Near Natural Area, was provided to
 6 the Forest Service and repeatedly cited to in public comments. *See* AR 004313; AR 005231, 5235;
 7 AR 006834-35. As discussed above, the Forest Service should have considered it and disclosed it to
 8 the public in analyzing impacts to the fox and marten’s discrete occupied habitat.

9 With respect to location of the fox’s den sites, Guardians does not ask for speculation. *See*
 10 Def. Br. at 31. To the contrary, Guardians simply asks the Forest Service to use the information it
 11 already had—including known fox locations and occupied habitat, denning habitat characteristics,
 12 and breeding patterns—to identify locations of likely denning sites, as it did for the Pacific marten.
 13 *See* AR 004077 (describing the Forest Service’s modeling of den site selection and den locations for
 14 the Pacific marten based upon existing available information). By failing to do this analysis for the
 15 fox, the Forest Service did not take into account the sites with the highest potential for adverse
 16 impacts. *See* AR 007043 (Dr. Sacks’s scoping comments insisting that “it seems crucial to locate
 17 den sites and to establish non-motorized zones or appropriate limited operating periods around
 18 them”); AR 004631 (Dr. Sack’s draft EIS comments regarding the same).² This is especially
 19 important given the small and vulnerable status of the fox population, which the Forest Service
 20 itself admits. Def. Br. at 26 (discussing “the small population size and isolation of foxes” and noting
 21 that inbreeding depression is a factor) (citing AR 000541).

22 Additionally, the Forest Service’s repeated insistence that the fox “tends to be nocturnal . . .
 23 lessen[ing] the likelihood that OSV use will injure, kill, or disturb it,” Def. Br. at 27, ignores the
 24 general disturbance that OSV presence in an area can cause to the species. While the fox and OSV
 25

26
 27 ² The Forest Service’s attempt to distinguish *WildEarth Guardians v. Jeffries* ignores its own duty
 28 to identify, and analyze impacts to, the most important habitat areas separate from the more general
 suitable habitat. Def. Br. at 32, n. 9; *see also Jeffries*, 370 F. Supp. 3d 1208, 1240 (D. Or. 2019) (“it
 is difficult to determine how the proposed agency action here will have an effect on elk calving and
 rutting areas if defendants have not adequately identified those areas.”).

1 users having a “difference in peak hours” may indeed reduce direct interactions, the Forest Service
2 did not adequately consider reasonably foreseeable indirect effects on foxes from the presence of
3 OSV tracks or the disturbance from OSV noise in certain areas during the day that might displace
4 the fox from using potential denning habitat or foraging areas or otherwise alter their behavior.
5 These impacts were described in the specialist report and Dr. Sacks’s comments. *See* AR 004094
6 (describing indirect effects to foxes, including noise disturbance and avoidance of OSV trail areas);
7 AR 004631-32 (Dr. Sacks’s draft EIS comments describing potential direct and indirect effects of
8 OSVs on foxes). Moreover, these effects can be extrapolated from the long-term wolverine study in
9 the record that found OSV use can cause habitat avoidance and impact the establishment of denning
10 sites. *See* AR 018517–26 (wolverine study 2014 progress report);
11 <https://esajournals.onlinelibrary.wiley.com/doi/full/10.1002/ecs2.2611> (2019 article on final results
12 of wolverine study finding habitat avoidance behaviors exhibited as response to OSV use). The
13 agency should have considered the result of this study given the limited fox studies on point.

14 Finally, the Forest Service’s arguments defending the OSV seasonal use limitation for
15 Sonora Pass to protect the fox during its sensitive breeding stage are undermined by evidence in the
16 record. First and foremost, the seasonal use limitation conflicts with comments submitted by the
17 scientists that studied the Sierra Nevada red fox population for multiple years and have the most in-
18 depth knowledge of it, but the agency’s brief does not even address those comments. *See infra* pp.
19 16-17 (discussing comments); Def. Br. at 32-33. Dr. Sacks insisted that *any* OSV use in the area
20 *after February* could impact the foxes by disturbing their sensitive breeding stage. AR 004631
21 (April 15th seasonal closure date is “woefully inadequate to protect pregnancies or neonates from
22 impacts.”). Although the Forest Service claims that “OSV use is relatively low” prior to April when
23 access to the Sonora Pass area is limited and mostly from the east through the Humboldt-Toiyabe
24 National Forest, Def. Br. at 32, it does occur.³ *See* AR 000133 (access to Sonora Pass is roughly 10
25 miles from the nearest plowed road via the Humboldt-Toiyabe National Forest); AR 003670–71 (on
26 average, OSV-users spend six hours per visit and travel a maximum of 80-miles round trip); AR

27 _____
28 ³ Indeed, if OSV use is really so low during this pre-April time period, then it would pose minimal
burden to OSV-users to close the Sonora Pass area earlier to protect the fox.

1 004718 (public comment expressing that “Sonora Pass is a legendary riding area that people from
 2 all over the United States have traveled to and ride”). And the agency completely fails to address
 3 the point that OSV use at Sonora Pass can be extended to the end of April, which would increase
 4 impacts to the fox during an important reproductive time. AR 000006-7; Def. Br. at 31–33.

5 These key flaws in the agency’s analysis show it did not take the required hard look at all
 6 direct and indirect effects, or rely on the best science, when analyzing effects to the Sierra Nevada
 7 red fox or Pacific marten, in violation of NEPA. 40 C.F.R. § 1500.1(b) (high quality information
 8 and accurate scientific analysis are essential to implementing NEPA); *id.* § 1502.24 (agencies must
 9 ensure scientific integrity of analysis and “make use of reliable existing data and resources”).

10 **B. Sierra Nevada Yellow-Legged Frog and Yosemite Toad**

11 Like with Sierra Nevada red fox and Pacific marten, the EIS assessed effects to suitable
 12 habitat and designated critical habitat for Sierra Nevada yellow-legged frog and Yosemite toad, but
 13 did not specifically assess effects to meadows that are currently or were historically occupied by the
 14 species. AR 000486-90, 504-10. As noted above, the locations these species actually occupy are the
 15 most important to consider because that is where the most significant adverse impacts would likely
 16 occur. The record establishes the agency had this relevant information, but ignored it.

17 The Forest Service’s brief spends considerable time summarizing the information in the EIS,
 18 and then offers short, paltry responses to Guardians’ arguments. Def. Br. at 34-38. It notes that the
 19 EIS identified occupied habitat, suitable habitat, and critical habitat in detailed maps, but the scale
 20 of those maps is so small it is impossible to discern the locations of the occupied sites. *Id.* at 37; AR
 21 000488, 490. Notably, the one detail the maps do make clear is that occupied sites are just a fraction
 22 of the overall suitable habitat and critical habitat, and for the frog are mostly found outside of
 23 critical habitat. AR 000488, 490. However, the EIS analysis does not explain which of those
 24 occupied sites overlap OSV designations or the level of OSV use expected at those occupied sites
 25 for each alternative action. AR 000487-90, 504-10. Thus, the maps in the EIS are insufficient to
 26 assess effects to occupied habitat for the frog and toad.

27 Likewise, the information in the minimization criteria screening tables cited by the Forest
 28 Service does not satisfy the agency’s duty under NEPA because it does not consider the effects of

1 the various alternative actions to the frog and toad. Def. Br. at 37; AR 000214-30. While the tables
 2 do provide information about which OSV use areas and trails overlap occupied or historic sites,
 3 they do not compare how the EIS alternatives differ in the amount of overlap, and thus fail to
 4 analyze the degree of impact to the threatened species. If an agency includes underlying information
 5 in an appendix, it still must conduct the necessary analysis in the EIS that compares the direct and
 6 indirect effects of each alternative action in order to take the required hard look and disclose
 7 relevant information to the public. 46 Fed. Reg. 18026, 18033 (March 23, 1981) (Forty Most Asked
 8 Questions Concerning CEQ’s NEPA Regulations) (while technical discussions “are best reserved
 9 for the appendix,” “a plain language summary of the analysis and conclusions of that technical
 10 discussion should go in the text of the EIS”). By not revealing how much OSV use may occur
 11 within the very limited occupied sites for each species under each alternative action, the EIS did not
 12 take a hard look at effects and make a reasoned comparison of alternatives, and the public could not
 13 offer comments on this key impact to Sierra Nevada yellow-legged frog and Yosemite toad. *Sierra*
 14 *Nevada Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 993 (E.D. Cal. 2005) (holding
 15 Forest Service violated NEPA where it failed to give public adequate information about impacts of
 16 logging project on wildlife to effectively participate in decision making process).

17 Finally, the Forest Service’s argument that it fulfilled its duty by incorporating by reference
 18 the biological assessment (BA) it prepared for consultation with U.S. Fish and Wildlife Service
 19 fails. Def. Br. at 37. First, incorporating that information by reference without at least a brief
 20 description does not satisfy the agency’s duty under NEPA. *Montana Snowmobile Ass’n*, 790 F.3d
 21 at 925; *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, No. 3:12-
 22 cv-2271-HZ, 2014 WL 6977611, at *16 (Dec. 9, 2014) (“An agency may not discharge its
 23 obligation to provide the public with analysis of the environmental impacts of a project simply by
 24 incorporating documents by reference.”). Second, the BA was not available for the public to review
 25 during the comment period. 40 C.F.R. § 1502.21 (“No material may be incorporated by reference
 26 unless it is reasonably available for inspection by potentially interested persons within the time
 27 allowed for comment.”). The BA was issued on May 17, 2019 and the Biological Opinion (“BO”)
 28 was issued on March 17, 2020, both of which were after the public comment period and objection

1 period. AR 003829 (BA); AR 003777 (BO); AR 004238 (comment period on draft EIS ended
 2 October 9, 2018); AR 004206 (objection period for ROD ended May 13, 2019). Indeed, public
 3 comments specifically noted ESA consultation was necessary and would contain important
 4 information. AR 000141-42, AR 006993, AR 006337. The Forest Service’s attempts to rely on and
 5 incorporate by reference information that was issued after the close of all public comment
 6 opportunities defeats NEPA’s goal of disclosing relevant information to the public. *Montana*
 7 *Snowmobile Ass’n*, 790 F.3d at 925; *Ctr. for Biological Diversity v. Gould*, 150 F. Supp. 3d 1170,
 8 1175, 1182-83 (E.D. Cal. 2015) (holding defendants failed to provide adequate opportunity for
 9 public comment where referenced analysis was issued the same day as the final EA and Decision).

10 Here, the agency simply omitted an important part of its effects analysis in the EIS. The BA
 11 demonstrates that the Forest Service had detailed information about which meadows Sierra Nevada
 12 yellow-legged frog and Yosemite toad currently or historically occupied and the level of OSV use
 13 that has occurred at these meadows. AR 003847-54. By failing to discuss these occupied sites and
 14 compare the impact of each alternative action on those occupied sites, the EIS failed to consider an
 15 important aspect of the problem because those sites are where the most significant effects would
 16 occur due to the actual presence of the species. If the decision-makers had considered that
 17 information, they may have chosen the more environmentally friendly alternative. *Robertson*, 490
 18 U.S. at 350 (NEPA’s twin goals are “almost certain to affect [an] agency’s substantive decision.”).
 19 In sum, the agency’s reliance on scattered pieces of the record do not cure its failure to discuss and
 20 assess effects on occupied habitat for the frog and toad within the EIS analysis.⁴

21 With respect to Guardians’ argument that the EIS also failed to explain and assess the use of
 22 a 24” snow depth just for Stanislaus Meadow and Highland Lakes, the Forest Service responds that
 23 NEPA does not require substantive results, just an analysis of the effects of alternatives. Def. Br. at
 24 37-38. But the EIS did not take a hard look at and disclose to the public information that was crucial
 25 to assess the effects of alternatives: information about OSV use levels at other meadows occupied
 26

27
 28 ⁴ Similarly, the Forest Service’s discussion of the conclusions in the BO, Def. Br. at 34, are
 irrelevant to this NEPA claim because the BO came out well after all public comment closed and its
 conclusions have nothing to do with whether the EIS fully assessed effects of all alternative actions.
 INTERVENOR-DEFENDANTS’ COMBINED REPLY BRIEF— 9

1 by the frog or toad. The Forest Service admitted in the BA that some of these other occupied
 2 meadows receive moderate or high levels of OSV use, and OSV use in the Herring Creek area in
 3 particular poses a high risk to Yosemite toad. AR 003847-54, 3866. The EIS should have disclosed
 4 this information to fully inform decision-makers and the public about the effects of the action and
 5 whether one or more alternatives should have considered a 24” snow depth for additional occupied
 6 meadows. As noted above, incorporating the BA by reference does not solve the problem when it
 7 was issued after the close of all public comment opportunities.

8 C. Near Natural Areas

9 Guardians argues the Forest Service failed to take a “hard look” at the probable impacts of
 10 opening the Pacific Valley and Eagle/Night Near Natural areas to OSV use because it failed to
 11 assess the likely increase in OSV use in those areas and the impacts to the sensitive resources and
 12 wildlife there. The Forest Service responds that it reasonably relied on historic use patterns to assess
 13 effects of opening the Near Natural areas to OSV use and that there is “no basis” for it to speculate
 14 that OSV use would increase in these areas under the preferred alternative. Def. Br. at 38–40. Yet,
 15 an increase in OSV use of Near Natural areas that were previously off-limits but now formally
 16 designated as open is a reasonably foreseeable impact that the Forest Service ignored. NEPA
 17 requires an agency’s cumulative impacts analysis to “include ‘indirect effects,’ which include
 18 ‘growth inducing effects.’” *Nw. Env’t Defense Center v. Nat’l Marine Fisheries Serv.*, 647 F. Supp.
 19 2d 1221, 1248 (D. Or. 2009) (quoting 40 C.F.R. § 1508.8(b)); *Ctr. for Env’t Law and Policy v. U.S.*
 20 *Bureau of Reclamation*, 715 F. Supp. 2d 1185, 1192-93 (E.D. Wash. 2010). *See also Neighbors of*
 21 *Cuddy Mtn. v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998) (NEPA requires “a reasonably
 22 thorough discussion of the significant aspects of *probable* environmental consequences.” (emphasis
 23 added) (cleaned up)).

24 Guardians pointed to specific facts in the administrative record that make increased OSV use
 25 in the designated Near Natural areas a probable outcome. Int. Br. at 26. For instance, a slew of
 26 public comments argued for the Near Natural areas to be completely opened to OSV use. *See, e.g.*,
 27 AR 004765, AR 005207-08, AR 005975-76. Because the preferred alternative only opens two of
 28 those areas to legal OSV use, it is a probable environmental consequence that OSV use will increase

1 in the areas that are open, given the desirability of the terrain. Accordingly, impacts to those areas
2 and sensitive wildlife that inhabit them could reasonably become more extreme and concentrated.
3 The Forest Service's failure to analyze these effects was unreasonable and violated NEPA.

4 As to the impacts from OSV use in Near Natural areas to sensitive wildlife, primarily the
5 Sierra Nevada red fox and Pacific marten, in its brief, the Forest Service simply reiterated that its
6 analysis was sufficient because it provided information regarding OSV use levels and percentage of
7 habitat overlap with OSV use. Def. Br. at 38-39. But as discussed above, this analysis was
8 inadequate because it failed to show occupied habitat in relation to the OSV designations despite
9 admitting that OSV use in Near Natural areas could significantly impact red fox and marten habitat.
10 *See, e.g.*, AR 000343. The agency never addressed expert scientist comments and data from CSERC
11 documenting the importance of the Pacific Valley and Eagle/Night Near Natural areas for these
12 species. AR 004632, AR 004659 (scientist comments noting documented locations of red fox near
13 Pacific Valley Near Natural Area and importance of that and Eagle/Night Near Natural Area to the
14 species); AR 005234-35 (noting detections of marten or fox in Pacific Valley, Eagle, and Night
15 Near Natural areas based on CSERC and FS data). For these reasons, the Forest Service's analysis
16 of OSV designations in Near Natural areas was deficient and violated NEPA.

17 **II. THE RECORD DOES NOT SHOW THE FOREST SERVICE MINIMIZED**
18 **IMPACTS TO WILDLIFE UNDER THE TRAVEL MANAGEMENT RULE.**

19 The Forest Service asserts that the winter travel plan need not completely avoid all effects to
20 wildlife, and that the agency conducted a thorough analysis applying the minimization criteria. Def.
21 Br. at 40-42. Even if these assertions are true, the agency must show that its application of the
22 minimization criteria was supported by the facts in the record and a rational explanation. *Montana*
23 *Snowmobile Ass'n*, 790 F.3d at 931; *Friends of the Clearwater v. Probert*, No. 3:21-cv-56-BLW,
24 2022 WL 768836, at *9 (D. Idaho March 12, 2022). The agency did not meet this burden for Sierra
25 Nevada yellow-legged frog, Yosemite toad, Sierra Nevada red fox, or Pacific marten.

26 The Forest Service states that it conducted a six-step process to apply the minimization
27 criteria, and one of those steps was determining if areas or trails should not be designated at all
28 because impacts could not be minimized. Def. Br. at 42; AR 000350-52. For aquatic wildlife, it

1 determined that it did not need to eliminate any OSV areas or trails from use to minimize impacts,
2 even for sites occupied by the frog or toad. AR 000214-30 (showing all Designation
3 Recommendations as 1 or 2). But, as Guardians pointed out in its opening brief, the Forest Service
4 conducted its analysis backwards. Based on the language in the Rule itself stating that “*in*
5 *designating* National Forest System trails and areas” the agency must minimize impacts to
6 resources, courts have made clear that the agency must initially locate or design areas and trails in
7 places or ways that are meant to minimize harassment of wildlife and disruption of wildlife habitat.
8 36 C.F.R. § 212.55(b) (emphasis added).

9 The Ninth Circuit explained this in *Montana Snowmobile Association*, where it stated that
10 the Forest Service must show “how it *designed* the areas open to snowmobile use with the objective
11 of minimizing . . . harassment of wildlife” 790 F.3d at 932 (emphasis added, internal
12 quotations omitted). The Court approved district court approaches that required the agency to show
13 “how the selected routes were *designed* with the objective of minimizing impacts,” and to “*place*
14 routes specifically to minimize damage to public resources, harassment and disruption of wildlife
15 and its habitat, and minimize conflicts of uses.” *Id.* (emphasis added, internal quotations omitted)
16 (citing *Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1073 (D. Idaho 2011); *Ctr.*
17 *for Biological Diversity v. BLM*, 746 F. Supp. 2d 1055, 1080 (N.D. Cal. 2009)). The U.S. District
18 Court of Oregon similarly stated that the Forest Service must minimize impacts to wildlife when
19 initially *locating* routes, and cannot rely only on mitigation. *Jeffries*, 370 F. Supp. 3d at 1249-51.

20 Here, the Forest Service did not design or locate areas and trails with the objective of
21 minimizing impacts to wildlife. Instead, the Forest Service pre-determined the location of OSV
22 areas and trails, and then assessed their impacts to wildlife. As explained in the EIS, the Forest
23 Service identified specific areas and trails for designation, and then used “screening questions” to
24 assess when those pre-determined areas and trails would have impacts to wildlife and whether those
25 impacts could be mitigated. AR 000350-51. But that process is not the same as initially locating
26 areas and trails in places that would have minimal impacts to wildlife.

27 For instance, the Alpine OSV area contains Stanislaus Meadow and Highland Lakes areas—
28 two of the most important habitat sites for the frog and toad. *See* AR 000214. Rather than consider

1 whether that entire pre-determined area should be eliminated from designation to minimize impacts,
2 the Forest Service could have initially located or designed the OSV area so that it excluded all or
3 parts of those meadows in order to minimize impacts to the frog and toad. Or it could have designed
4 smaller OSV areas that did not incorporate those meadows in order to locate them outside of that
5 important habitat. The Forest Service admitted these meadows could see increased use under the
6 new plan, yet included them within the Alpine OSV area. AR 003863. The same is true for other
7 OSV areas that overlap meadows occupied by the species, such as Highway 108 and Highway 108
8 West that contain multiple frog and toad sites. AR 000217, 219. The agency could have located or
9 designed OSV areas in ways that excluded some or all of those occupied sites to minimize impacts,
10 but instead determined the locations first and then asked if impacts could be mitigated. By
11 determining the OSV areas first and considering impacts later, the Forest Service failed to locate or
12 design OSV areas with the objective of minimizing impacts to the species and their habitat.

13 Furthermore, the Forest Service did not explain how locating trails within or adjacent to
14 occupied frog and toad sites minimized harm when those trails will facilitate OSV use at those sites.
15 Trails 04N12, 05N31, 07N09, 08N01g, 08N12, and 08N13 all occur adjacent to or within occupied
16 sites, including trails adjacent to Highland Lakes and Herring Creek sites and within Stanislaus
17 Meadow. AR 000226-29; AR 003847-48, 003852-54. Elsewhere, the Forest Service acknowledged
18 that trails facilitate use of meadows. AR 003660. This is especially true for Stanislaus Meadow,
19 where a designated groomed trail runs through the meadow. AR 000229; AR 003848 (noting
20 groomed trail in close proximity to Stanislaus meadow, “thereby encouraging use”); AR 003805
21 (noting groomed, high-use trail transects meadow and runs along creek occupied by frog). And U.S.
22 Fish and Wildlife Service noted the ungroomed trail that runs along the margin of several occupied
23 Herring Creek meadows created a high risk to toads. AR 003805. The minimization criteria
24 screening table assessed whether management requirements were needed to mitigate harm from the
25 trails, but there was no explanation as to how placing these trails in or adjacent to occupied frog and
26 toad sites complied with the requirement to *locate* trails with the objective of minimizing
27 harassment of the species and disruption of their habitat. AR 000226-29.

1 With regard to mitigation measures, the Forest Service’s decision to use a 24” snow depth
2 only for Stanislaus and Highland Lakes meadows was unreasonable based on the information in the
3 record. The agency argues that its snow depth requirements were reasonable and should get
4 deference based on assertions by its employees that Stanislaus Meadow and Highland Lakes receive
5 concentrated OSV use and are destination play areas, unlike other OSV areas. Def. Br. at 43. But
6 the Forest Service ignores facts that undermine the agency’s conclusion. In the BA, the Forest
7 Service stated that one of the greatest risks to the frog and toad are “cross-country areas with
8 moderate [OSV] use levels.” AR 003863. The BA and BO document numerous other meadows
9 occupied by the frog or toad in moderate use OSV areas: Summit Lake, Niagara Creek Meadow,
10 Tryon Meadow, Bear Tree Meadow, and multiple Herring Creek meadows (Lower Three, Upper
11 Three, Middle Three, Bluff, and Wire Corral meadows). AR 003847, 3853-54; AR 003802. In fact,
12 the EIS maps show Stanislaus Meadow, Highland Lakes area, and Herring Creek area (as well as
13 others) all as moderate use OSV play areas. *See* AR 001204 (map showing use levels of play areas),
14 AR 001209 (map showing Alpine OSV Area contains Stanislaus Meadow and Highland Lakes and
15 Highway 108 Area contains Herring Creek). Because these additional occupied sites are all in
16 meadows, they would act as snow play areas for OSVs just like Stanislaus Meadow and the
17 meadows in the Highland Lakes area rather than places OSVs would simply pass through. Def. Br.
18 at 43. And many of these meadows contain very small, isolated populations of the endangered frog
19 or threatened toad, creating a high risk of localized extirpation if individuals are killed—another
20 fact the Forest Service ignores. AR 003847-48, 3851-54, 3875; AR 003791-92, 3794-95.

21 The decision to impose only a 12” snow depth for the Herring Creek meadows was
22 particularly unreasonable given the information in the record. These meadows make up one of the
23 largest populations of Yosemite toad, with ten occupied meadows in the complex. AR 003852,
24 3854. The Forest Service stated in the BA that the most significant risk to toads from OSV use
25 would occur late in the OSV season when bare areas in meadows are created by melting snowpack,
26 and OSVs could harass, injure or kill toads that are moving from overwintering habitats to breeding
27 habitats. AR 003866. It went on to say that, “[t]he greatest risk would occur at Highland Lakes
28 (Map 3 and 4) *and in the Herring Creek areas* (map 5) because they are popular with OSV users

(moderate use level) and the greater level of use increases the potential to affect individuals (both intensity and duration).” *Id.* (emphasis added). Despite these statements, the Forest Service still claims the Herring Creek meadows are not a destination play area like Stanislaus Meadow and Highland Lakes. Def Br. at 43. Numerous comments from snowmobilers also undercut this assertion, noting use and “great riding” in the Herring Creek area, and that this is a “favorite place to snowmobile.” AR 005683, AR 005797, AR 006101, AR 006125, AR 006122, AR 006211, AR 006232, AR 006235. These comments reinforce that Herring Creek meadows will see at least moderate OSV use. The Forest Service’s decision not to use a 24” snow depth for the Herring Creek area was unreasonable and not supported by the record.⁵

The Forest Service’s arguments regarding minimization of impacts to the Sierra Nevada red fox and Pacific marten are also irrational and unsupported by the record. The agency again asserts it was reasonable to only assess impacts to suitable habitat because it assumed all suitable habitat is occupied by the species. Def. Br. at 43-44. But again, this assumption is not reasonable for species that have small populations on the forest. As discussed above, occupied habitat is a small fraction of suitable habitat for rare species such as those at issue here, and assessing impacts to areas the species actually occupy is critical. *See supra* pp. 3-4; AR 000488, 490 (habitat maps for frog and toad); AR 004076-77, 4088, 4090 (marten is Region 5 sensitive species with just three known locations on the forest, fox population is small and concentrated around Sonora Pass). As stated for the frog and toad, adverse effects of OSV use “are most likely to occur where high or moderate OSV use overlaps *occupied* . . . habitat. . . .” AR 003808 (emphasis added). Simply claiming that reducing OSV use within suitable habitat would minimize impacts to the fox and marten was irrational. Def. Br. at 44, 45.

The Forest Service did recognize in its minimization screening table that the “Sonora Pass area” is occupied habitat for the fox and that Highway 108 and Highway 108 East OSV areas

⁵ As with Guardians’ NEPA claim, U.S. Fish and Wildlife Service’s conclusions that the OSV designations would not jeopardize the continued existence of the species as a whole, AR 003810, pertains to ESA standards, not the Travel Management Rule. Indeed, the Fish and Wildlife Service recognized that adverse effects to frogs, toads, and their habitat were expected to occur where high or moderate OSV use overlaps occupied frog or toad habitat. AR 003808. It is these adverse effects the Forest Service needed to minimize to comply with the Travel Management Rule.

1 overlap that habitat. AR 000234-38. In fact, the agency located an OSV play-area right at Sonora
 2 Pass. AR 000003, AR 001205 (maps showing 400-acre OSV area at Sonora Pass as part of
 3 Highway 108 area designation). The Forest Service relies on a seasonal OSV use limitation to
 4 mitigate impacts of that play-area, AR 000234-38, but as discussed above, mitigation is not a
 5 substitute for minimizing impacts when initially locating OSV areas. *Supra* p. 12. Additionally,
 6 scientists studying this population of red fox stated that it has been documented very near Highland
 7 Lakes Road and Peep Sight Peak, and thus very close to the Alpine OSV area and groomed trail
 8 08N01g, but the Forest Service did not acknowledge those facts. AR 004632, AR 004659
 9 (scientists' comments); AR 000001 (map); AR 000230, 232, 247 (stating that Alpine and Alpine
 10 East OSV areas and trail 08N01g do not overlap with known occupied fox habitat). For the marten,
 11 the Forest Service never discussed where the OSV areas or trails occur in relation to the three
 12 locations on the forest in which marten have been found and thus did not document whether it was
 13 locating OSV areas and trails in places that overlap or are near known occupied habitat for marten.
 14 AR 000230-41; AR 004076-77, 4079-86. As with the frog and toad, the Forest Service's
 15 minimization analysis for the red fox and marten did not comply with the Travel Management Rule.

16 The agency's reliance on the seasonal OSV use limitation at Sonora Pass to minimize
 17 impacts to the fox was also unreasonable, and the Forest Service's defense of this seasonal
 18 restriction ignores several key points. Def. Br. at 44, 45. For one, the agency never addresses the
 19 fact that it ignored comments from the scientist who studied this population of red fox for more than
 20 seven years. *Id.*; AR 004630-33; AR 030621, AR 030834, AR 030969. Dr. Sacks states:

21 OSV use in the vicinity of den sites could be especially problematic. Based on our
 22 findings to this point, poor reproduction appears to have been the primary factor
 23 inhibiting population growth in the Sierra Nevada red fox population. Selection of
 24 den sites begins as early as December, with pups born sometime during March
 25 through May, after which pups are dependent on mothers for warmth for another
 26 few weeks, remain in dens for another week or so after that, and are dependent on
 27 milk for a few weeks longer still. The last 2-4 weeks of pregnancy, females may be
 28 relegated to their subterranean dens, relying on their mates to provision them.

Throughout this sensitive period (late gestation through lactation), which coincides
 with peak snow, disturbance can cause den abandonment and stress to pregnant or
 nursing females, potentially jeopardizing pregnancies or litters. Therefore, it seems
 crucial to establish non-motorized zones or appropriate limited operating periods
 around den sites or potential den sites (e.g. denning habitat in areas of Sierra
 Nevada red fox occupancy). Proposals to limit seasonal use of OSV in the Night

1 Near Natural to before April 15th, as allowed in alternative 5, are woefully
2 inadequate to protect pregnancies or neonates from impacts. Assuming parturition
3 on April 1 (based on our best information), any activity in this area after February
risks impacts to Sierra Nevada red fox reproduction.

4 AR 004631. He specifically recommended that all OSV use be disallowed after February in the
5 Sonora Pass area. *Id.* at 4632. This comment undercuts the Forest Service's statement that the April
6 15 closure date would "minimize the potential for OSV use to impact denning females and pups."
7 Def. Br. at 44 (citing AR 000234).

8 As noted above, the agency claims OSV use at Sonora Pass is "relatively low" from January
9 to April before plowing of Highway 108 occurs so the April 15 date is reasonable. Def. Br. at 44.
10 *Supra* p. 6. Yet even "relatively low" use contradicts Dr. Sacks's recommendation to forbid all OSV
11 use after February to protect pregnant foxes and early pups. Moreover, if use increases at the
12 beginning of April or even earlier in years the State can begin plowing sooner, denning females and
13 pups born before April 15 could be affected by the increased OSV use. And OSV use could extend
14 until late April under the ROD. AR 000006-07 (OSV use could be extended until last Sunday in
15 April). Thus, it is possible that increased OSV use could occur during the entire month of April,
16 which the agency acknowledges is the most likely time for pup emergence. Def. Br. at 44.

17 SSF disputes that coyote predation of pups is a threat to the fox, claiming there is no science
18 to prove coyotes use compacted trails to reach high elevation fox habitat or that they prey upon fox
19 pups. SSF Br. at 19-20, 22. Absolute proof in wildlife science is almost unattainable. Scientists
20 often must use studies of different species, or from different locations, to draw educated
21 conclusions. The record here strongly supports the conclusion that OSV use may adversely affect
22 Sierra Nevada red fox. The Forest Service recognized uncertainty in the science, but explained the
23 various threats to the fox from OSV use based on the best science available. AR 004090-95. It
24 discussed in depth the threat from coyotes intruding into high elevation fox habitat, explaining that
25 predation of foxes may be one threat based on evidence of coyotes chasing and killing other fox
26 sub-species but that competition for food or displacement of foxes are also threats. AR 004091-92,
27 4094-95. Sierra Nevada red fox generally separate themselves from coyotes by inhabiting higher
28 elevation areas, and invasion of that habitat by coyotes could push the fox out. AR 004091-92.

1 While the Forest Service noted conflicting science on coyote use of snowmobile trails, AR 004095,
2 the researcher studying this very population stated that “[o]ur preliminary data suggests that coyotes
3 actively used groomed or well-used OSV trails to access higher-elevation locations they might
4 otherwise have been unable to access under those high snow conditions.” AR 004631. Other studies
5 in the record also support that proposition. AR 017511; AR 018084; AR 024196.

6 SSF harangues the Forest Service for relying extensively on one study by Perrine to support
7 its analysis, but the agency can only rely on the science that exists. Given the small size and range
8 of Sierra Nevada red fox, it is not surprising there is limited science on this particular species. The
9 dearth of science on Sierra Nevada red fox highlights the importance of comments by Dr. Sacks,
10 which both SSF and the Forest Service ignore. In addition to the passage quoted above, he noted
11 that potential impacts from OSVs to foxes include noise disturbance, habituation, increasing access
12 to competing species such as coyotes, which are known generally to competitively exclude and kill
13 red foxes, and preventing individual foxes from dispersing into new territories, creating a barrier to
14 expanding the population’s range and size. AR 004631-32. OSVs can also harm small mammals
15 living in the subnivean zone that are prey for foxes. AR 000525. The existing science supports the
16 conclusion that OSVs may adversely affect Sierra Nevada red fox and the Forest Service had a duty
17 to minimize those impacts when designating OSV areas and trails.

18 Finally, the Forest Service’s argument that the fox’s population is stable and increasing and
19 thus OSV use cannot be having an adverse effect is belied by the record and the science. Def. Br. at
20 45. Dr. Sacks pointed out this population is “dangerously small” with low genetic diversity and
21 inbreeding depression, and just began increasing for the first time in decades because non-native
22 foxes introduced new genes. AR 004631; AR 030626-93. The Forest Service itself admitted the fox
23 population is “considerably less than an effective population size of 50.” AR 004090. In very small
24 populations as this, “failed reproduction of even a few individuals sustained over multiple years has
25 the potential to cause or accelerate declines.” AR 004659. Because of its low abundance and
26 isolation, the Forest Service’s conclusion that adverse effects to individual foxes are not likely to
27 impair the viability of the population “is unwarranted.” *Id.*; *see also* AR 004631 (increase in
28 population size is necessary for recovery of species). Any adverse effect of OSV use on fox

1 reproduction would have serious repercussions for this “dangerously small” population, but the
 2 Forest Service failed to minimize that threat in violation of the Travel Management Rule.

3 **III. THE FOREST SERVICE USES AN INCORRECT INTERPRETATION OF**
 4 **ITS REGULATIONS TO JUSTIFY ITS FOREST PLAN AMENDMENT.**

5 The Forest Service defends the Forest Plan amendment that removes the prohibition on
 6 OSV use in all Near Natural areas on the forest by relying on an improper post hoc rationalization
 7 that it can ignore the actual amendment and its impacts and simply look at the subsequent plan
 8 when applying the requirements of the NFMA planning regulations. Def. Br. at 46-48. The Court
 9 should give no weight to this argument because it is inconsistent with the plain language and intent
 10 of the regulations, the caselaw interpreting the regulations, and the evidence in the administrative
 11 record. An agency’s interpretation of a regulation is owed no deference “when it appears that the
 12 interpretation is nothing more than a convenient litigating position or a *post hoc* rationalization
 13 advanced by an agency seeking to defend past agency action against attack.” *Christopher v.*
 14 *SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); *see also Locke*, 626 F.3d at 1049-50
 15 (rejecting explanations “raised for the first time in defendants’ briefs [that] were not mentioned by
 16 [the agency] in the decision under review.”).

17 First, the regulations themselves contradict the Forest Service’s position. When the agency
 18 amends a Forest Plan, it must determine which substantive requirement(s) in the regulations “are
 19 directly related to the plan direction being added, modified, or removed by the amendment and
 20 apply such requirement(s) *within the scope and scale of the amendment*.” 36 C.F.R. § 219.13(b)(5)
 21 (emphasis added). If the agency could ignore the amendment itself when applying the substantive
 22 requirements, it would not be applying them “within the scope and scale of the amendment.” The
 23 Federal Register preamble to the regulations repeatedly makes clear the agency’s intent was to
 24 consider the *purpose and effects* of the changes being proposed when applying the substantive
 25 requirements, and apply them commensurate with the scope and scale of the amendment. 81 Fed.
 26
 27
 28

1 Reg. 90,723, 90,725-26, 90,731 (Dec. 15, 2016).⁶

2 The case the Forest Service relies on does not even support its interpretation. Def. Br. at 46
 3 (citing *Cascade Forest Conservancy v. U.S. Forest Serv.*, 577 F. Supp. 3d 1163 (W.D. Wash. 2021),
 4 *aff'd* 2022 WL 10964667 (9th Cir. Oct. 19, 2022)). In *Cascade Forest Conservancy*, the Forest
 5 Service made a temporary, project-specific amendment to a Forest Plan. 577 F. Supp. 3d at 1182.
 6 The agency determined two substantive requirements (pertaining to recreation and aesthetic values)
 7 directly related to the Plan amendment at issue, and the Court found the agency “applied them
 8 within the scope and scale of the amendment, which is limited in time (Project duration) and scope
 9 (less than 0.5 percent of the Monument).” *Id.* The Court upheld the agency’s analysis that
 10 concluded the plan *amendment* would meet the overarching goals of the substantive requirements
 11 because the amendment would affect just a small area for a finite time, and the short duration of the
 12 amendment did not prevent the current plan components from being met overall. *Id.* The Ninth
 13 Circuit affirmed, explaining that the Forest Service had applied the two substantive requirements
 14 *within the scope and scale of the amendment* and reasonably concluded that the *amendment* would
 15 meet the overarching goals of these requirements. 2022 WL 10964667, at *2 (citing 36 C.F.R. §
 16 219.13(b)(5)) (emphasis added). This case clearly shows the agency and the courts focused on *the*
 17 *amendment itself* and the impact it would have when applying the substantive requirements of the
 18 regulations. In contrast to the short-term, localized amendment at issue in *Cascade Forest*
 19 *Conservancy*, the amendment here is permanent and forest-wide. The agency must consider the
 20 scope and scale of that change to the Plan and its effects when applying the substantive
 21 requirements of the regulations.

22 This reasoning is consistent with the Fourth Circuit’s interpretation of the regulations in
 23 *Wild Virginia v. U.S. Forest Service*, where the court looked at the Forest Plan amendments
 24 themselves and their impacts to determine whether the agency had properly applied substantive
 25 requirements for soil and riparian resources. 24 F.4th 915, 931 (4th Cir. 2022). The court held the
 26

27
 28 ⁶ The preamble stated, “if scoping or NEPA effects analysis for the amendment reveals substantial
 adverse effects, the responsible official must identify and apply the specific substantive
 requirement(s) within §§ 219.8 through 219.11 associated with those effects.” 81 Fed. Reg. 90,731.
 INTERVENOR-DEFENDANTS’ COMBINED REPLY BRIEF— 20

1 Forest Service had not properly applied the requirements where it had not shown the *plan*
2 *amendments* would maintain or restore those resources. *Id.* It rejected the argument that the agency
3 could just look at the remaining plan components that covered the general plan area to fulfill its
4 duty when amending the plan. *Id.* at 931-32. Here, the Forest Service’s assertion that it can
5 completely ignore the amendment itself, including its scope and scale, when applying the
6 substantive requirements is counter to the plain language and intent of the regulations and courts’
7 interpretation of that language. Def. Br. at 46. While there may be other Stanislaus Forest Plan
8 provisions that protect resources, Def. Br. at 47-48, the agency still must consider how the specific
9 amendment at issue affects achievement of the substantive requirements.

10 The administrative record also fails to support the Forest Service’s post hoc rationalization.
11 The Forest Service determined substantive requirements for (1) ecological sustainability, (2)
12 economic and social sustainability, (3) ecosystem diversity, and (4) integrated resource management
13 for multiple use were directly related to the plan amendment. AR 000355-56. The EIS explained
14 that a “substantive requirement is directly related to the amendment when scoping or NEPA effects
15 analysis for the proposed amendment reveals substantial adverse effects associated with that
16 requirement, or when the proposed amendment would substantially lessen protections for a specific
17 resource or use.” AR 000355 (citing 36 C.F.R. § 219.13(b)(5)(ii)(A)). The EIS concluded that the
18 NEPA analysis and other information received in comments indicate OSV use in Near Natural areas
19 may impact sensitive wildlife and substantially lessen protections for them, and thus the plan
20 amendment was directly related to the ecological sustainability, ecosystem diversity, and multiple
21 use requirements. AR 000355-56.

22 Later, the EIS made determinations about the effects of the forest plan amendments on
23 various wildlife species, noting the amendment allowing OSV use in Near Natural areas may impact
24 Sierra Nevada yellow-legged frog, Yosemite toad, Pacific marten, and Sierra Nevada red fox but
25 that those impacts would be less than substantial. AR 000408-10. In its brief, the Forest Service
26 claims this analysis was just intended to assess whether those species were potential “species of
27 conservation concern,” Def. Br. at 47, n. 17, but that is not reflected by the record. The EIS stated,
28 “the forest plan amendment effects analysis focused on potential OSV-use within these areas and

1 the potential effects of that use,” and then set forth its analysis in “Table 19: Forest Plan
 2 Amendment Effects Determinations: OSV-use within Non-Motorized Management Areas.” AR
 3 000408. The ROD likewise referred to this Table as part of the effects analysis for the Forest Plan
 4 amendment. AR 000009-10. The EIS and ROD contained no further documentation to apply the
 5 substantive requirements of the 2012 regulations to this Plan amendment, including no discussion of
 6 the remaining Plan components that the agency now contends fulfill its obligations. Def. Br. at 47-
 7 48; AR 000406-10; AR 000009-10. This Court should reject the Forest Service’s post hoc litigation
 8 position that it can ignore the effects of the amendment itself and just rely on remaining plan
 9 components to apply the substantive requirements of the regulations because it is contradicted by
 10 the agency’s statements in the record.

11 As discussed in Guardians’ opening brief, the agency’s attempt to apply the NFMA
 12 substantive requirements to the plan amendment through its EIS effects determination is legally and
 13 factually flawed, and thus does not comply with the 2012 regulations. Int. Br. at 31-34.

14 **IV. SSF’S CLAIMS OVER THE 12” MINIMUM SNOW DEPTH ARE NOT** 15 **SUPPORTED BY THE RECORD.**

16 SSF argues that the record shows the Forest Plan required a 12” minimum snow depth only
 17 for *cross country* OSV use, not for OSV *trail* use, and thus the EIS environmental baseline (i.e. no
 18 action alternative) should not have included a 12” minimum snow depth for trail use. SSF Br. at 6-
 19 9. However, the record supports use of a uniform 12” minimum snow depth for the environmental
 20 baseline. The 2012 “Calaveras Snow Trail Maintenance Decision Memo” and “Summit Snow Trail
 21 Maintenance Decision Memo” directed management of two snow trail systems on the Stanislaus
 22 National Forest, and Project Design Elements for both included: “Only permit OSV use on the
 23 groomed trail system and adjacent concentrated-use riding areas when there is sufficient snow cover
 24 (minimum snow depth of 12 inches) to protect soil and vegetation.” AR 011435, 11443; AR
 25 011410, 11418. Notes from 2014 further show the Forest Service interpreted the Forest Plan as
 26 allowing “snowmobile use anywhere there is 12 inches of snow that is not in restricted areas such as
 27 wilderness and [Research Natural Areas].” AR 011404; *see also* AR 011114 (2014 statement that
 28 “[t]he Stanislaus National Forest currently grooms approximately 60 miles of snowmobile trails.

1 Snowmobile travel is allowed when there is at least 12 inches of snow.”). These were the applicable
2 references for snow depth standards in use just prior to the winter travel plan. The 2003 Winter
3 Recreation Guide submitted by the snowmobilers with their response, SSF Ex. 1 (ECF No. 43-1),
4 was for the Summit Ranger District, but that Guide was superseded by the 2012 Summit Snow Trail
5 Maintenance Decision cited above that specified a 12” minimum snow depth for OSV use on that
6 trail system. AR 011410, 11418. Thus, SSF is incorrect that “the 12-inch minimum snow depth
7 requirement for OSV trails is a new management restriction.” SSF Br. at 8.⁷

8 Second, SSF argues that the EIS should have considered an alternative action that had a
9 lower minimum snow depth, and failed to explain why it chose a 12” standard. SSF Br. at 11-13.
10 SSF apparently wants to ignore the long history of reliance on a 12” minimum snow depth used by
11 the Forest Service in its Forest Plan and in the Calaveras and Summit Ranger District Snow Trail
12 Maintenance Decisions, and by the State of California for its grooming program. AR 011518; AR
13 011443; AR 011418; AR 000371. Those standards were all put in place to protect resources, and the
14 Forest Service would have needed strong scientific support to lower those standards in a new winter
15 travel plan. Instead, after initially considering a 6” minimum snow depth for trails, the experts
16 agreed that a uniform 12” standard was the appropriate standard to minimize harm to soil,
17 vegetation, water, and wildlife. AR 011056-73; AR 000345-48, 384; AR 001667-68, 1673; AR
18 003350-53; AR 003762-63; AR 003857-69. EPA similarly recommended a 12” minimum snow
19 depth in its comments. AR 010780. The record fully supports use of this standard.

20 The second flaw in SSF’s argument is that an alternative action that violated the Travel
21 Management Rule would not meet the purpose and need of the Project, and thus did not need to be
22 considered. *Pacific Coast Fed’n of Fishermen’s Ass’ns v. Blank*, 693 F.3d 1084, 1100 (9th Cir.
23 2012); *N. Alaska Env’t Ctr. v. Kempthorne*, 457 F.3d 969, 978-79 (9th Cir. 2006). SSF fails to
24 acknowledge that complying with the Rule is one of the main purposes of the new winter travel
25 plan, which includes ensuring OSV use occurs where there is adequate snow, and that the plan
26 _____

27 ⁷ SSF also seems confused about snow depth measurements in its discussion about grooming. SSF
28 Br. at 8. Even though grooming would compact the snow on trails, snow depths would be measured
in off-trail undisturbed snow. AR 000382 (snow depths would be measured “in areas that are
relatively uniform, undisturbed, level, and naturally shielded from the wind in all directions).
INTERVENOR-DEFENDANTS’ COMBINED REPLY BRIEF— 23

1 minimizes impacts to natural and cultural resources. AR 004242; AR 000338. The 12” snow depth
 2 requirement was a key management prescription to minimize damage to soils, water resources,
 3 vegetation, cultural resources, and aquatic wildlife. AR 000153-66. The ROD itself stated that the
 4 12” minimum snow depth was necessary to ensure compliance with the Travel Rule minimization
 5 criteria. AR 000013-14. It was not unreasonable to reject an alternative that the agency believed
 6 would not meet the requirements of the Travel Management Rule, and thus would not meet the
 7 purpose and need of the winter travel plan.⁸

8 **V. THE APPROPRIATE REMEDY IS REMAND WITHOUT VACATUR.**

9 If the court grants any of Guardians’ or SSF’s claims, it should remand the Plan without
 10 vacatur. At a minimum, the court should allow supplemental briefing on this issue, as requested by
 11 the Government. Def. Br. at 49. SSF’s argument for vacatur overplays the scope of the alleged legal
 12 violations in the Plan and focuses primarily on the harm to their recreational interests. SSF Br. at
 13 24–25. Moreover, it dismisses—in direct conflict with the record—the likelihood of harm to
 14 imperiled species and the environment if the plan were vacated. *Id.* at 25.

15 First, SSF’s argument focuses only on the seriousness of the legal violations and the
 16 likelihood of the Forest Service reaffirming the same decision on remand but fails to grapple with
 17 the fact that the violations are narrow in scope. SSF Br. at 25. Because all the violations involve
 18 narrow legal issues or discrete geographic areas, vacatur is unwarranted. *See WildEarth Guardians*
 19 *v. Steele*, 545 F. Supp. 3d 855, 884–85 (D. Mont. 2021) (no vacatur when legal violations were
 20 relatively limited and on remand the agency was unlikely to reach a different result as to the plan *as*
 21 *a whole*); *Western Watersheds Project v BLM*, No. 13-cv-1028-PGR, 2015 WL 846548, at *12 (D.
 22 Ariz. Feb. 26, 2015) (remanding unlawful management plan without vacatur where agency may be
 23 able to readily cure defect). For example, even if the court finds in favor of SSF’s argument on the
 24 12-inch minimum snow depth, the plan could remain in place while the agency considers a new
 25 alternative with a different minimum snow depth.

26
 27
 28 ⁸Guardians has not addressed SSF’s claims concerning the 5000’ elevation threshold but notes that
 SSF still relies on only two instances of snow below 5000’ in the past eleven years, establishing that
 OSV use below 5000’ would be very limited and infrequent.

Second, SSF improperly dismisses the disruptive consequences that would occur to the environment and imperiled wildlife if the plan were vacated, stating only that “[r]eturning to the status quo . . . will not cause environmental harm.” SSF Br. at 25. SSF focuses on harm to its recreational interests in OSV use and fear of “bureaucratic inertia.” *Id.* Indeed, SSF completely fails to acknowledge the four imperiled species that inhabit the Stanislaus, including three species listed as endangered or threatened under the ESA, and the ample scientific evidence in the record regarding the threat OSV use poses to these species and the natural environment. *See, e.g.*, AR 000404 (harm to soils); AR 000524–25 (harm to terrestrial wildlife); AR 000497, 000504, 000507–08 (harm to aquatic species). In similar balancing tests to determine the proper remedy, Congress made very clear that endangered species are afforded “the highest of priorities.” *Cf. Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978). Additionally, there would still be ample areas on the Stanislaus open for OSV use if the plan remains in place. This minimal harm to SSF’s recreational interests does not outweigh the harm to the environment and threatened and endangered species from a return to unregulated snowmobile use, which would also be contrary to the purpose of the Travel Management Rule. *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (no vacatur when risk of potential harm to endangered species would be greater if agency decision was vacated); *Cal. Cmities. Against Toxics v. U.S. Env’t Prot. Agency*, 688 F.3d 989, 994 (9th Cir. 2012) (remanding without vacatur where it threatened air pollution contrary to purpose of Clean Air Act).

While the legal errors at issue in this lawsuit are relatively narrow, the disruptive consequences for the environment and imperiled wildlife on the Stanislaus National Forest if the plan is vacated are significant, and this plan was issued in response to a settlement agreement and has already exceeded the deadline from that agreement. The court should decline to vacate the winter travel plan and instead allow it to remain in place while the agency supplements its analysis.

CONCLUSION

For the foregoing reasons, the Court should deny SSF’s motion for summary judgment and grant Guardians’ motion for summary judgment, and remand the Stanislaus winter travel plan to the agency for further analysis without vacating the plan.

1
2 Dated: November 10, 2022

Respectfully submitted,

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4 /s/ Jessica L. Blome

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8
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November 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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