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By **Electronic Mail** to appeals-chief@fs.fed.us

USDA Forest Service
EMC, RPC-6th Floor
Attn: Judicial and Administrative Reviews
1601 N. Kent St.
Arlington, VA 22209

Re: Facts and Arguments in Support of and Opposition to Giant Sequoia National Monument (“GSNM”) Plan Appeals 13-13-00-0001, 13-13-00-0002, 13-13-00-0003, and 13-13-00-0004

On December 13, 2012, Sierra Club and Sequoia ForestKeeper (“Intervenors”) submitted their Request to Intervene in four appeals, submitted by Bud Hoekstra, the Snowlands Network, the American Forest Resources Council/Sierra Forest Products, and the California Forestry Association. On December 26, 2012, the Appeal Reviewing Officer for the Chief, James M. Pena, granted Intervenors’ request. According to Optional Appeal Procedures, section 14(c), Intervenors have submitted this timely statement of facts and arguments in support or in opposition to these four appeals within 30 days of that approval. Concurrently, Intervenors have furnished copies of all its submission to each of the four appellants, in accordance with section 14(d) (see Cc list on last page).

I. FACTS AND ARGUMENTS IN SUPPORT OF NOA# 13-13-00-0001 (BUD HOEKSTRA)

Generally, Intervenors support all aspects the Bud Hoekstra appeal. In particular, Intervenors assert that the FEIS analysis regarding surface and ground water withdrawals and the analysis of beneficial uses is inadequate with regard to cumulative effects and objects of interest.

In his appeal, Bud Hoekstra raises the issue of water withdrawals and beneficial uses with respect to effects from the transportation system in the Monument:

#2. Page 58, 104 & 125, especially page 104, Transportation System, 1-6

Article 10, Section 2, of the State Constitution: "It is hereby declared ... the water resources of the state be put to beneficial use to the fullest extent to which they are capable, and that waste or unreasonable use or method of unreasonable use of water be prevented, and the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof ..."

The FEIS acknowledges that:

Water is a valued resource enjoyed by the public through recreation opportunities and then collected and harnessed to provide drinking water, irrigation, and power to the central valley and desert communities. Rivers run wild from high mountains, ripple and tumble through mid-elevation conifer forests and meadows, rage through steep-walled canyons, and are contained and diverted at lower elevations.

FEIS, p. 277.

Although the FEIS ranks water diversions and withdrawal as the highest of threats,¹ the GSNM Plan and FEIS fail to thoroughly consider or discuss the cumulative effects from surface water withdrawals, and the Plan fails to protect and restore natural water flow paths that could threaten Monument Objects of Interest.

The Plan & FEIS include requirements for maintaining roads in the Monument to protect and restore natural water flow paths, including:

Maintain and restore the hydrologic connectivity of streams, meadows, wetlands, and other special aquatic features by identifying roads and trails that intercept, divert, or disrupt natural surface and subsurface water flow paths. Implement corrective actions, where necessary, to restore connectivity.

GSNM Plan, p. 98, S&G #22; FEIS, Appx. N, p. 889.

¹ Threats:

Across all southern Sierra Nevada ecosystems, the [Southern Sierra Partnership] assessment found that riparian and aquatic ecosystems were at the highest risk, followed by the different forest types (oak woodland, mixed conifer, subalpine/alpine), and migratory and wide-ranging wildlife. **Overall, the highest ranked threats were surface and groundwater withdrawals ("Very High")**. A certain number of overall threats ranked "High" are influenced by Forest Service management, such as water management, climate change, roads, changes in fire regime, livestock grazing practices, invasive nonnative plants and animals, pests and pathogens, and habitat loss outside the planning area. (FEIS, p. 189) (emphasis added).

But while the FEIS mentions numerous water diversions in the Monument (p. 254-57),² it does not consider alternatives to the disruption of natural surface flow by these permitted water diversions.

And while the FEIS also mentions groundwater withdrawals in the Monument (p. 543),³ it does not consider or discuss the cumulative impacts from these various surface and ground water withdrawals or alternatives to the disruption of natural surface flow by these permitted water diversions in the Monument, even though “Groundwater is a key component of the water resources in the Monument.” FEIS, p. 266.⁴

² Quotes about water diversion in the FEIS:

In addition to Porter Slough, numerous irrigation diversions are along the river. Water that is not diverted terminates in the Tulare lakebed. (FEIS, p. 254).

Numerous wells, spring developments, and diversions are located in th[e Middle Fork Tule River] watershed on National Forest System lands. Camp Nelson Water Company has a diversion from Belknap Creek; Alpine Village has a community spring box development; Cedar Slope community has a diversion from Marshall Creek; Slate Mountain Homeowners have a well and filter basin; and 11 spring developments or diversions provide water to individual cabins. ... Two hydroelectric power plants are located in this watershed. One plant is owned by Pacific Gas and Electric Company (PG&E) and is located on the North Fork of the Middle Fork Tule River. The other is owned by Southern California Edison (SCE) and is located on the Middle Fork Tule River. Both PG&E and SCE divert waters from the channel to produce electricity. PG&E diverts water near Wishon Campground by lift pump, while SCE diverts water near the powerhouse at highway 190. These plants operate on unregulated flow of the Middle Fork Tule River. Both of these projects are run-of-the-river and return all water for downstream uses. (FEIS, p. 257).

³ Groundwater Monitoring:

Monitoring of groundwater will be conducted to validate the assumption that “Groundwater pumping from water wells in campgrounds and administrative sites within the zone of ecological influence of groundwater-dependent ecosystems is less than groundwater recharge to these systems.” This is important in giant sequoia groves where campgrounds and wells are located. Monitoring should consist of determining groundwater drawdown from wells in campgrounds in the groves. Lysimeters should be installed around the groves to determine the relationship between soil moisture and **groundwater withdrawal** in the groves (see the Monitoring and Evaluation section in Part 3 of the Monument Plan). (FEIS, p. 543).

⁴ Importance of Groundwater:

Groundwater is fundamental to sustain the health, productivity and diversity of aquatic wildlife, terrestrial wildlife and the human populations within and downstream of the Monument. Groundwater is critical to maintain ground dependent ecosystems and is part of the total water system that moves water from the high elevation, snow regions to the lower elevation, groundwater discharge zones. The

All discussions of cumulative effects are limited to cumulative watershed effects from management activities (pp. 529-30). The analysis also does not consider various groundwater withdrawals outside campgrounds and administrative sites (p. 543). In fact, the statement there on cumulative effects admits that cumulative watershed effects model “does not directly address cumulative effects to groundwater” and only “indirectly addresses cumulative effects to groundwater by ensuring that surface water processes are not adversely affected.” *Id.*

And while the FEIS discusses the issue of protecting the diversity of species and diversity of “users” of the Monument, it fails to consider alternatives to allowing water diversions that are removing essential water needed by certain objects of interest (such as wildlife and natural vegetation), which the Forest Service is mandated to protect over recreational and other uses in the Monument.

II. FACTS AND ARGUMENTS IN SUPPORT OF NOA# 13-13-00-0002 (SNOWLANDS NETWORK APPEAL)

Generally, Intervenors support all aspects the Snowlands Network appeal. Most critically, we agree with Snowlands Network that the GSNM Plan lacks an adequate transportation plan.

The GSNM Plan, FEIS, and associated analysis documents fail to provide a transportation plan based on the travel analysis processes and as required to by the Monument Proclamation:

“The management plan shall contain a transportation plan for the monument that provides for visitor enjoyment and understanding about the scientific and historic objects in the monument, consistent with their protection. For the purposes of protecting the objects included in the monument, motorized vehicle use will be permitted only on designated roads, and non-motorized mechanized vehicle use will be permitted only on designated roads and trails, except for emergency or authorized administrative purposes or to provide access for persons with disabilities.” (Clinton Proclamation)

Moreover, the so-called transportation “plan” is not supported by any site-specific environmental analysis of its effects on the various resources and objects of interest.

A. The GSNM FEIS fails to disclose winter specific impacts from OSVs

programmatic activities and management strategies proposed in the alternatives of this FEIS have been evaluated for their potential effect to groundwater resources. (FEIS, p. 266).

Snowlands Network writes:

The process used to designate roads for OSV use is flawed because it designates all OHV roads as open for OSV use without adequate analysis of winter specific impacts. These impacts include noise, (b) air and water quality, and (c) safety of other forest users.

The environmental analysis fails to address the problem of displaced non-motorized forest use resulting from OSV use.

The restriction of OSVs to roads does not eliminate the problems caused by the use of OSVs

Not only has the Forest Service failed analyze and designate which roads should be closed to OSVs (similar to its failure to designate which trails should be closed to mountain bikes), the analysis of the effects from OSVs (snowmobiles) on other users and resources is completely lacking.

NEPA requires that the Forest Service take a “hard look” at the impacts from its authorized activities and disclose their direct, indirect, and cumulative effects.

The Forest Service has asserted that it does not have to disclose these effects from recreational activities because they have previously been disclosed:

The effects from existing activities represent a baseline and are carried forward through the range of alternatives. These activities have been approved in prior environmental analyses, including the existing Forest Plan. The programmatic effects described for each of the other alternatives include the effects of ongoing activities.

FEIS, p. 555 (emphasis added). But there is no such prior analysis in the existing plan or prior analyses, which ever addressed OSVs or addressed the impacts of OSVs to all of the objects of interest in the GSNM. In the FEIS Response to Comments, the Forest Service dodges the issue of impacts and user conflicts from OSVs and puts this off for future review, as needed.

PC #382: The Forest Service should conduct an analysis of what roads are appropriate for snowmobile use.

Response: National Forest System roads were designated for use by all motorized recreationists, including snowmobiles, on December 31, 2000, as described in the Clinton proclamation. Any changes made in the future to the designations will be analyzed in

travel analysis processes and with site specific environmental analysis.

FEIS, Appx. L at 654-55.

Moreover, there is no direction in the Plan about OSVs, other than to say that all roads are open to OSVs.

Further, the Proclamation requires that recreation shall be permitted only when it is consistent with the Monument's purpose of protecting the objects. "The plan will provide for and encourage continued public and recreational access and use consistent with the purposes of the monument." How can recreation be consistent if the FEIS fails to provide an environmental impact analysis for certain types of high-impact recreation, such as OSVs?

Clearly there are effects from recreational activities and associated infrastructure (read "roads" and "trails"), which are immediately authorized for use by the GSNM Plan ROD. No further project decision need take place to authorize recreation, road, or trail use, so the effects from recreation and associated infrastructure (including OSV grooming activities) is a "direct" effect of the issuance of the GSNM Plan. *See Ohio Forestry Assn. v. Sierra Club*, 523 U.S. 726, 739 (1998) ("at oral argument, the Solicitor General agreed that if the Sierra Club's claim was that the [forest] 'plan was allowing motorcycles into a bird-watching area or something [like that], that would be immediately justiciable.'"). As the 6th Circuit Court of appeals explains:

Unlike logging, the activities about which Meister complains—gun hunting and snowmobile use—do not require further action by the Service before they can occur. To the contrary, they have in fact occurred ever since the Plan's issuance, with the resultant harms that Meister now alleges. Thus, the Plan itself has harmed him in concrete ways. His claims are ripe.

Meister v. U.S. Dept. of Agriculture, 623 F.3d 363, 370 (6th Cir. 2010).

While the Forest Service has only responded by listing all of the effects "on" Recreation (*see id.*, pp. 655-56), it never points to anywhere in the FEIS where it now or in the previously Dec. 31, 2000 designation of roads open to OSVs ever disclosed the environmental effects from OSVs and grooming activities. Moreover, the Forest Service has not provide any criteria about where, when, and how snowmobiles can be used. These need to be addressed: how many, carrying capacity, and how monitored and enforced. Finally, there is no mention of snowmobile outfitters or whether these outfitters operate under special use permits. This needs to be disclosed.

Because there is no discussion about the direct or indirect impacts from recreation on the Monument objects, safety, or conflict with other users in the FEIS or in the previous planning documents, the decision violates NEPA.

B. The range of alternatives with respect to Winter Recreation is unreasonable.

An EIS must “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed project. 40 C.F.R. § 1502.14(a).

As we discussed in our appeal, the Scientific Advisory Board’s Advisory XVII. p. 37 (Exhibit K to Sierra Club GSNM Appeal) discusses the need to develop alternatives for the Transportation Plan, which necessarily includes authorized OSV use and associated grooming. But the Forest Service has not prepared any alternatives that specifically address winter recreation. For example, in areas that are accessible in winter, the Forest Service should be providing some areas where the public can have safe, motor-free quiet recreation (in addition to the Montecito Resort). Snow play, sledding, cross-country skiing, and wildlife photography and filming are generally incompatible with racing snowmobiles.

Federal agencies have a great deal of experience with OSV use in other park areas, such as Yellowstone National Park where snowmobile use has been regulated for many years. There, the National Park Service has crafted various alternatives for OSV use, which could be used as a model for preparing alternatives in the GSNM.

See

<http://parkplanning.nps.gov/document.cfm?parkID=111&projectID=40806&documentID=48306> (Yellowstone Draft Winter Use Plan Supplemental EIS).

Moreover, the Supplemental Draft EIS for Yellowstone (available at that link) provides a model for how the Forest Service could consider and disclose the environmental consequences from OSVs, as required by NEPA (see previous section).

III. FACTS AND ARGUMENT IN OPPOSITION TO NOA# 13-13-00-0004 (American Forest Resources Council (“AFRC”) and Sierra Forest Products (“SFP”))

A. AFRC and SFP Lack Standing to Pursue its Objections

As a threshold matter, because AFRC’s and SFP’s interests are purely economical, based on its desire to continue commercial harvest of timber from the Giant Sequoia National Monument, they have no standing to pursue their objections because they fall outside the zone of interest for which the Monument and its Management Plan

were created, since commercial timber harvest therein is now prohibited. Therefore, the Forest Service should summarily dismiss the AFRC/SFP appeal.

AFRC and SFP assert their purely economic interest:

AFRC's mission is to create a favorable operating environment for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions that determine or influence the management of all lands. ...

Sierra Forest Products has an interest as the mill most directly affected by the decision given that its mill in Terra Bella is closest to the Monument and has historically harvested timber from the area covered by the Monument. Sierra Forest Products employs over 120 people and uses over 33 million board feet per year on one shift which is just half of the mill's capacity. ...

Many AFRC member mills are operating at 65% of capacity at this time, with raw materials supply being the major factor limiting operations. The appellant's interests will be adversely affected by the decision made for this project. (Appeal, p. 2).⁵

Any injury that may be caused by a reduction in future timber supplies is too speculative because "Timber Companies have no right to compel the Forest Service to sell any future timber to them." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 808 (11th Cir. 1993) (citing *Intermountain Forest Industry Ass'n v. Lyng*, 683 F. Supp. 1330, 1340 (D. Wyo. 1988) (timber companies have no right to future timber)).

[Industry p]laintiffs assert both economic and aesthetic injuries. However, in reviewing plaintiffs' affidavits, the court finds that

⁵ The AFRC/SFP appeal suggests an altruistic motive that it must be allowed to continue harvesting dead or dying timber to provide for healthy forests. But their motive is unavailing to convey standing, because their interest is still purely economic and because there is little support for the need to remove dead or dying trees. Forest ecosystems and associated wildlife thrive with and are even dependent on snags and snag forest patches. Moreover, the assertion that snag density is more than adequate is unfounded and is contradicted by the available scientific data. The Forest Service's own comprehensive survey of California's forests, using thousands of fixed plots, recently concluded that there is a large snag deficit in all forested regions of California relative to the minimum habitat needs of many cavity-nesting wildlife species, with less than 2 large snags per acre in all forested areas of the state (Christensen et al. 2008). See also Declaration of Dr. Chad Hanson ¶¶ 14 (attached as Exhibit E to Sierra Club GSNM Appeal). Even North et al. (2009) specifically warns against the adverse impacts of thinning in terms of the potential to exacerbate what North et al. (2009) describe as the "deficit" of larger snags in the Sierra Nevada (see North et al. 2009, pp. vii and 29).

plaintiffs' asserted injuries are in fact only economic. The court reaches this conclusion because each of the members representing the plaintiffs allege harm to only their respective businesses.

[Industry p]laintiffs, therefore, lack standing because the Organic Act, MUSYA and NFMA do not provide a legally cognizable economic interest in a specified level of timber harvest. At the same time, the statute grants the Secretary of Agriculture discretion to determine harvest level. 16 U.S.C. § 1611(a)

Mountain States Legal Found. v. Glickman, 922 F. Supp. 628, 632 (D.D.C. 1995), *aff'd* 92 F.2d 1228 (D.C. Cir. 1996) (citing *Region 8 Forest Serv. Timber Purchasers v. Alcock*, 993 F.2d 800, 808 (11th Cir. 1993)).⁶

Moreover, AFRC/SFP lack prudential standing under NEPA because they are not within NEPA's "zone of interest." See *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (the "zone of interest" test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."); see *Ocean Advocates v. USACE*, 402 F.3d 846, 861 (9th Cir. 2005) ("Congress drafted NEPA in order to protect the environment").

B. The Monument Proclamation does not compel the "harvest" of any timber, which is not at all the same as "tree removal"

In fact, the Monument Proclamation explicitly prohibits commercial logging or timber production, and allows tree removal "only if clearly needed for ecological restoration and maintenance or public safety."

The AFRC/SFP appeal conflates the meaning of tree removal with timber harvest, when these are very different concepts. We have stated previously that we agree with the Forest Service's interpretation that "tree removal" means to take out of the GSNM by burning or mechanical means (GSNM Plan, p. 78). Moreover, the removal of the smaller trees from the monument hardly ever results in "timber" as AFRC/SFP implies, even if mechanical treatments are prescribed.

⁶ Moreover, any reduction in available timber under the existing contracts held by SFP or any increased logging costs under the contracts arise out of contracts with the United States, and those contracts provide that all disputes arising under or relating to the contracts are to be resolved in accordance with the Contract Disputes Act ("CDA"), not management plans, such as the one for GSNM. See *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1486 (9th Cir. 1985) (timber contract falls within the Contract Disputes Act), *cert. denied*, 474 U.S. 919, 106 S. Ct. 248, 88 L. Ed. 2d 256 and *cert. denied*, 474 U.S. 931, 106 S. Ct. 265, 88 L. Ed. 2d 271 (1985). Even if the contracts did not so provide, the CDA would apply to any of SFP's contract claims. See 41 U.S.C.A. § 602(a)(4).

It is unclear from the reference in the AFRC/SFP appeal (to “EIS p. 156”)⁷ where the Forest Service may have allegedly stated that the Proclamation permits the harvest of trees when the FEIS actually states the opposite. In discussing Alternative E and California spotted owl habitat areas (“SOHAs”), the Forest Service correctly states several times that “[h]owever, SOHAs only restrict *timber harvest, which is not a management option because of the Clinton proclamation (2000).*” FEIS, p. 467, 478, and 481.

In addition, as we have stated in our appeal and reiterate now, “tree removal” also necessarily includes a decision to fell the tree, and the felling decision can only go forward if it is “clearly needed for ecological restoration and maintenance or public safety.” Here, we agree with the point made in the California Attorney General’s appeal of the GSNM Plan:

It would be nonsensical for the Proclamation to restrict tree removal so explicitly if “removal,” within the meaning of the Proclamation, were not intended to encompass tree felling as well. In other words, the Proclamation cannot be interpreted consistently with its primary protective and restorative purpose if tree felling within the Monument is not subject to at least the same restrictive standards that the Proclamation specifies for tree removal. Otherwise any tree could be felled for any purpose, regardless of whether or not such felling serves the protective and/or restorative intentions of the Monument, but tree removal could only occur if clearly needed for ecological restoration, etc. This does not make sense in terms of serving the Proclamation’s vision and purpose. It is clear from the totality of the Proclamation that its discussion of tree removal is intended to include felling as well. Thus, the “clearly needed for ecological restoration and maintenance or public safety” standard that the Proclamation applies directly to tree removal encompasses and applies to tree felling, and this must be made clear in the Plan.

Cal. Atty. Gen. Appeal (13-13-00-0008), p. 6.

The AFRC/SFP appeal also appears to conflate tree removal with mechanical treatments, which do not necessarily include tree removal. Most of the times, mechanical treatments will not include tree removal from the monument and would only involve the felling of small trees or cutting brush to prepare areas for the reintroduction of fire. In those cases, trees or brush would either be lopped and scattered or piled for future burning, but would not necessarily be removed.

The appeal also makes the bold assertion that a fire and fuels strategy without mechanical treatments is not supported by the best scientific information or

⁷ There is no mention of timber harvest on this page in the FEIS or DEIS.

adequately explained in the final documents, although AFRC/SFP provide no support for their assertion. As Intervenors have provided in great detail in our appeal, the adjacent Sequoia and Kings Canyon National Parks have been implementing an effective fire and fuels strategy with virtually no mechanical treatments for over 30 years.

C. Timber Harvest is not needed to comply with NEPA and the stated purpose and need for the GSNM

The AFRC/SFP appeal makes the absurd assertion that mechanical treatments or even timber harvests are needed to meet the purpose and need for the GSNM FEIS. This assertion suggests that forest ecosystems cannot function without logging or mechanical treatments, even though they have done so effectively for millions of years. Even today, forest ecosystems in roadless areas and designated Wilderness effectively recover from natural and even human disturbances without human interference. But the purpose and need for the GSNM does not require hands-off management, and as the neighboring Sequoia and Kings Canyon National Parks have shown, forest can be effectively restored from decades of fire suppression and historic logging almost exclusively with managed fire and only a few mechanical treatment in areas 200 feet or more from structures. There is no support for mechanical treatments up to 1/4 mile from roads.

Moreover, the use of helicopters or landings outside the Monument to avoid ground disturbing activities in areas with slopes that exceed 35% is absurd because (1) only small trees need to be treated, (2) these treatments, if necessary, could be done using hand tool rather than mechanical treatments, and (3) use of helicopters would be cost prohibitive. The purpose and need is to restore the GSNM, which does not require the removal of medium-large trees with helicopters.

D. There is likely no difference in the effects on carbon emissions when comparing prescribed burning to biomass removal

The AFRC/SFP appeal suggests the FEIS is lacking because there is “no discussion or comparison of the greatly reduced net carbon emissions from mechanical treatments and biomass removals.” p. 4.

Although Intervenors have also asked for better carbon accounting in our appeal, the likely reason why there is no comparison between prescribed burning carbon emissions and the assumed “reduced” emissions from mechanical treatments and biomass removals is because both likely result in the same amount of carbon emissions into the atmosphere. Because most of the biomass that may be removed from the monument through mechanical treatments will likely end up in cogeneration facilities similar to the one at SFP’s Terra Bella facility, there is little, if any, reduction in net carbon emissions.

AFRC/SFP have it completely backward in their assertion that “The use of managed fire does not prevent the increasing stand density due to the growth of large trees that has led to millions of acres of mortality to Forest Service lands in the western states due to bark beetles and drought.” p. 5.

Instead, a study discussed in the GSNM FEIS suggests that prescribed fire will prevent increasing stand density and will result in more sequestered carbon:

Scrutiny of the overall carbon budget for specific ecosystems may reveal that reduction or exclusion of fires to promote forests carbon sink properties may not necessarily be effective. A recent study by Fellows and Goulden (2008) showed that due to fire exclusion between the 1930s and the 1990s, U.S. mid-montane conifer forests underwent pest and disease induced net loss of big trees while forest stem density (small tree numbers) increased. This effect caused a noteworthy net decline of above ground carbon biomass (storage). Such findings indicate prescribed burning may be a potent method for forest carbon sequestration in California and the Monument.

FEIS, p. 435.

Again, the appeal provides no support for the assertion that snag densities in the Sequoia National Forest or Monument are either higher than the minimum stated in the forest plan or are adequate to provide the necessary habitat for the objects of interest. In fact, to the contrary, snag densities across the entire Sierra Nevada are inadequate. See Footnote 5, above.

E. Neither the Organic Act nor the Healthy Forest Restoration Act compel mechanical treatments or the sale of any timber

The AFRC/SFP appeal advances the argument that the Healthy Forest Restoration Act (HFRA) somehow compels mechanical treatments, which the GSNM Plan prohibits or restricts. It also continues to advance the tired argument that the GSNM Plan somehow violates the Organic Act.

The Organic Act has been amended by the National Forest Management Act (NFMA) and National Forest are also governed by the Multiple Use Sustained Yield Act (MUSYA). MUSYA recognizes that “some land will be used for less than all of the resources.” 16 U.S.C. § 531(a).

The Organic Act delegated to the Secretary of Agriculture the discretion whether or not to sell timber. 16 U.S.C. § 476; *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452, 455 (9th Cir. 1971); *Parker*

v. United States, 307 F. Supp. 685, 688 (D. Colo. 1969). NFMA modifies the Organic Act by providing that the Secretary "may sell" timber located on national forest land. 16 U.S.C. § 472a(a) (2).

Intermountain Forest Industry Asso. v. Lyng, 683 F. Supp. 1330, 1338 (D. Wyo. 1988).

[Industry plaintiff] argues strenuously that the TMP [timber management plan] affects individual rights and obligations and therefore binds both the Forest Service and the courts. This assumes, however, that the company possesses a right to harvest timber from the Bridger-Teton National Forest. No such right is conferred by statute or regulation. Amendments to the Organic Act not only left timber sales to the Secretary's discretion but also expressly tied the exercise of that discretion to furthering the multiple-use concept. 16 U.S.C. § 472a (a). Nothing in the TMP defines who may harvest timber or under what conditions. The TMP does not give [industry plaintiff] a right to harvest specific volumes of timber in specified locations.

Id. at 1340.

As with the Organic Act, the provisions of MUSYA give the Forest Service broad discretion to regulate NFS lands for a wide variety of purposes. *See Perkins v. Bergland*, 608 F.2d 803, 806-07 (9th Cir. 1979) (The language found in 16 U.S.C. §§ 528, 529, and 531 "can hardly be considered concrete limits upon agency discretion. Rather, it is language which 'breathe(s) discretion at every pore.' " (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975))); *see also United States v. New Mexico*, 438 U.S. 696, 713, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978) ("[W]e conclude that the Multiple-Use Sustained-Yield Act of 1960 was intended to broaden the purposes for which national forests had previously been administered . . ."). Under MUSYA's statutory scheme, which supplemented the broad authority granted in the Organic Act, Congress clearly authorized the Forest Service to regulate NFS lands for multiple uses, including those protected by the Roadless Rule, such as "outdoor recreation," "watershed," and "wildlife and fish purposes." 16 U.S.C. § 528. We therefore conclude that the Forest Service had the authority—under the Organic Act and MUSYA—to promulgate a rule protecting NFS lands through restrictions on commercial logging and road construction.

Wyoming v. USDA, 661 F.3d 1209, 1235 (10th Cir. 2011).

Just as the Forest Service is authorized under MUSYA, the Organic Act, and NFMA to restrict commercial logging by regulations, as it did with its Roadless Rule, so is it authorized to restrict tree felling and removal (including timber harvest and commercial logging) in the Giant Sequoia National Monument. Moreover, the President's power under the Antiquities Act advances the goals of these statutes by providing the protection of some of multiple uses, consistent with MUSYA's acknowledgement that "some land will be used for less than all of the resources." 16 U.S.C. § 531(a).

With respect to the HFRA, nothing in GSNM plan is inconsistent with the goals of the HFRA. There is nothing in the HFRA that compels logging or even mechanical treatments. Just like the other statutes, it provides the agency with the discretion to act or even implement its provision with tree removal. In fact, the lowered diameter limits⁸ in the various alternatives are consistent with the purposes of the HFRA, which state that "the Secretary shall carry out a covered project in a manner that—(A) *focuses largely on small diameter trees ...* and (B) *maximizes the retention of large trees*" HFRA Section 102(f) (emphasis added).

F. Salvage logging is prohibited in the Monument

As discussed above, the Organic Act and the NFMA do not compel logging, including the "salvage" of dead or dying trees, and so the Forest Service has the discretion not to remove those trees. In addition, because the Proclamation allows removal of trees only for ecological restoration and maintenance or public safety, and not to recover economic value, salvage logging (after a fires or insect or disease infestations) is prohibited because salvage logging, as defined by the Forest Service, is done only to recover economic value.

The Forest Service defines salvage and salvage logging as follows:

Salvage. The removal of dead trees or trees damaged or dying because of injurious agents other than competition, *to recover economic value that would otherwise be lost.*

Forest Service Manual at 2435.05. But recovery of economic value is inconsistent with the Proclamation's limitations against tree removal because it is not for ecological restoration and maintenance or public safety.

⁸ While the AFRC/SFP appeal asserts that the 20 inch diameter limit is arbitrarily low, it provides no bases for a larger diameter limit, except the possible inference that larger trees need to be removed for economic reasons. Intervenor have also asserted that a 20 inch diameter limit is arbitrary, but that this limit is too high by provided scientific evidence that fuel treatments are effective at an 8 inch diameter limit, even without tree removal. See Sierra Club Appeal, pp. 17-21.

There is also a clear need to leave these snags after a fire for wildlife. Salvage logging, therefore, would be counter to ecological restoration and maintenance. Nor could any ecological justification be offered, given that the scientific community is in consensus that post-fire logging is extremely harmful ecologically, and is not supported scientifically.

Areas of high-intensity fire resulting from large, intense wildland fires create some of the best, most biodiverse, and most ecologically rich wildlife habitat, according to the current science (Bock and Lynch 1970, Hutto 2006, Noss et al. 2006, Hanson and North 2008, Swanson et al. 2010, USDA 2010). High-intensity, or stand-transforming, fire creates ecologically-vital “snag forest habitat”, which is rich with large snags, large downed logs, dense pockets of natural conifer regeneration, patches of native shrub habitat, or “montane chaparral”, and large live trees. In snag forest habitat, countless species of flying insects are attracted to the wealth of flowering shrubs which propagate after stand-transforming fire—bees, dragonflies, butterflies, and flying beetles. Many colorful species of birds, such as the iridescent blue Mountain Bluebird, nest and forage in snag forest habitat to feed upon the flying insects.

In order to feed upon the larvae of bark beetles and wood-boring beetles in fire-killed trees, woodpeckers colonize snag forest habitat shortly after the fire, excavating nest cavities in large snags. The woodpeckers make new nest holes each year, leaving the old ones to be used as nests by various species of songbirds. Many rare and imperiled bat species roost in old woodpecker cavities in large snags, and feed upon the flying insects at dusk. Small mammals, such as snowshoe hares and woodrats, live in the shrub patches and large downed logs, and raptors, such as the Spotted Owl, benefit from the increase in the abundance of their small mammal prey and, in fact, recent evidence shows that Spotted Owls preferentially select high-intensity fire areas (that have not been salvage logged) for foraging, while preferring low-intensity fire areas for roosting (Bond et al. 2009b); Monica Bond Declaration Exhibit, ¶5.

Deer browse upon the vigorous new plant growth that follows stand-transforming fire, and bears benefit from the increased abundance of their prey as well. A number of native wildlife species, such as the Black-backed Woodpecker, are largely restricted to snag forest habitat for nesting and foraging. In fact, the Black-backed Woodpecker depends upon large patches of high-intensity fire (generally minimum of 200-300 acres per pair) that have recently occurred (generally no more than 6 years or so post-fire), have not been salvage logged, and occurred in areas that were dense, high-canopy cover, mature/old-growth forest prior to the fire (Hutto 1995, Hutto and Gallo 2006, Hanson and North 2008, Russell et al. 2007, Hutto 2008). Without a continuous supply of this ephemeral habitat, they won't survive. Snag forest habitat is alive, and vibrant. It is colorful, and rich with varied sounds, given the sheer density of wildlife activity. It is the most rare, endangered, and

ecologically important forest habitat in western U.S. forests, and the stand-transforming fires that create this habitat are not damaging the forest ecosystem.

Allowing snag forest habitat to persist, rather than logging it to recover economic value, advances ecological restoration

G. Changes made between the draft and final GSNM Plan were within the range of alternatives considered

The AFRC/SFP appeal suggests that “significant” changes between the draft and final EIS with additional public comment violate NEPA. It points to the 1/4 mile mechanical treatment “limitation” in the wildland urban interface.

First, the 1/4 mile mechanical limitation from roads does not appear to be an express prohibition because the GSNM plan states only that “mechanical treatments will be limited *or* prohibited ... in areas more than ¼ mile from a road” GSNM Plan, p. 78 (emphasis added). Nothing in the Standards and Guidelines expressly prohibit mechanical treatments in those areas indicated in the list on that page, although we will hold the Forest Service to those limitations.

But more importantly, because several alternatives included mechanical treatments limitations that were even more restrictive, such as Alternative C & D (300 ft and 200 ft from roads, respectively), the 1/4 mile mechanical treatment limitation from roads is within the range of options considered in the DEIS. Please note that Intervenor do not support any of the distances in these alternatives, and only support use of mechanical treatments within 200 feet of structures in the Monument.

H. The 20-inch diameter limit is arbitrarily high to meet the purpose and need

The AFRC/SFP appeal asserts that the 20 inch diameter limit is arbitrarily low, but appellants provide no bases for a larger diameter limit, except the possible inference that larger trees need to be removed for economic reasons. Intervenor have also asserted that a 20 inch diameter limit is arbitrary, but that this limit is too high by provided scientific evidence that fuel treatments are effective at an 8 inch diameter limit, even without tree removal. *See* Sierra Club Appeal, pp. 17-21.

IV. FACTS AND ARGUMENTS IN OPPOSITION TO NOA# 13-13-00-0003 (CALIFORNIA FORESTRY ASSOCIATION (“CFA”))

A. CFA lacks standing to pursue its objections.

Just like AFRC and SFP, CFA's appeal should be summarily dismissed because CFA's interests are purely economical.

CFA describes its economic interest and that of its members:

The California Forestry Association (CFA) is a trade association whose members are: producers of forest products, forest landowners, biomass powerplant owners who generate electricity; and natural resource professionals committed to environmentally sound policies, responsible forestry, and sustainable use of natural resources.

Sierra Forest Products, Inc. (SFP), a member of CFA, has a state-of-the-art sawmill and co-generation powerplant in Terra Bella, CA. This infrastructure continues to be seriously stressed due to the lack of wood supply from the Sequoia and Sierra National Forests since year 2001. SFP must successfully acquire about 25 million board feet (mmbf) of sawlogs annually from these two National Forests to maintain their 36 mmbf, one shift annual production.

CFA Appeal, p. 1.

Neither the Monument nor the Sequoia National Forest (or the Sierra National Forest, for that matter) has any obligation to provide any timber to SFP, since ““Timber Companies have no right to compel the Forest Service to sell any future timber to them.” *Alcock*, 993 F.2d at 808; *see Glickman*, 922 F.Supp. at 632 (industry plaintiffs “lack standing because the Organic Act, MUSYA and NFMA do not provide a legally cognizable economic interest in a specified level of timber harvest.”); *see also Clark*, 479 U.S. at 399; *USACE*, 402 F.3d at 861 (plaintiffs lack prudential standing under NEPA because their interest is not marginally related to or is inconsistent with the purposes of the statute).

B. There is no obligation on the part of the Forest Service to provide timber from the Monument to AFC's member SFP

The GSNM was created to end commercial logging, not to assure that SFP's sawmill could “maintain their 36 mmbf, one shift annual production” or to help source 25 mmbf of timber from the national forests. The ability or desire to continue operating a mill without a reliable source of timber is a business decision left to the owner of the mill. It is not an obligation of the public or the Forest Service, especially from lands intended to be protected from timber harvest. Moreover, the Monument Plan, to comply with the Proclamation, cannot provide a prescribed output of timber because “No portion of the monument shall be considered to be suited for timber production, and no part of the monument shall be used in a

calculation or provision of a sustained yield of timber from the Sequoia National Forest.” GSNM Proclamation.

C. CFA’s rationale for promoting one of the FEIS Alternatives over another is unsupported by the goals and mandates of the GSNM Proclamation

CFA’s appeal provides a list of its own objectives for why the Forest Service should have chosen Alternative F over B. But those objectives have little to do with the Forest Service’s obligations to meet the letter and intent of the GSNM Proclamation. The primary purpose for the GSNM is “protecting the objects identified” the Proclamation. “These forests need restoration to counteract the effects of a century of fire suppression and logging.” GSNM Proclamation. They do not need the heavy-handed management suggest in either Alt. F or B, as suggested by CFA. CFA and these alternatives effectively promote more of the same (“fires suppression and logging”) rather than more fire and fewer mechanical treatments and tree felling/removal.

D. There is no rationale for allowing a 20 inch diameter limit

The CFA appeal asserts that there is no rationale provided in the ROD for the 20 inch diameter. But CFA provides no bases for a larger diameter limit, except the possible inference that larger trees need to be removed for economic reasons. The diameter limits of the 2001 SNFPA and the 2004 SNFPA were NOT supported by credible science; they were both compromises to keep logs flowing to the Sierra Nevada sawmills, which cannot be used as a reason to cut or remove trees from the Monument.

In addition, CFA suggests that North et al. 2009⁹ includes a basis for eliminating a diameter limit. That is not correct. The Forest Service

misrepresents North et al. (2009), misleadingly claiming that this unpublished and non-peer-reviewed report concluded that it is necessary to “remove 20- to 30-inch [diameter] trees when overly dense stands are moisture stressed”. In fact, North et al. (2009) specifically warn that such thinning of mature trees should be avoided where there is not an overabundance of large snags with regard to wildlife needs, since such thinning would tend to reduce stand density and adversely affect future large snag recruitment (North et al. 2009, p. vii). North et al. (2009) specifically warns against the adverse impacts of such thinning in terms of the potential to exacerbate what North et al. (2009) describe as the “deficit” of larger snags in the Sierra Nevada

⁹ North et al. 2009 has many loopholes that could be read to encourage logging because of the report’s failure to reference science for many of the unsupported conclusions it reaches.

(see North et al. 2009, pp. vii and 29). Moreover, where North et al. (2009) discuss thinning of trees 20-30 inches in diameter in relation to moisture stress, they do not provide a single citation to any ecological study which recommends removal of such mature trees as opposed to converting such trees into ecologically-important large snags or large downed logs. In other words, there is no explanation why, ecologically, a large stump would be more important in the forest ecosystem than a large live tree, large snag, or large downed log—or, stated differently, why such mature trees would be more ecologically beneficial to the forest ecosystem and native wildlife on the bed of a logging truck headed for the timber mill than it would be as a live tree, large snag, or downed log providing habitat for wildlife species in the forest. Clearly, the authors of North et al. (2009) were either discussing “removal” of trees 20-30 inches in diameter in the context of socioeconomic issues (without directly stating so), or they were simply less careful than they should have been with regard to their language, and did not mean to discuss “removal” of mature trees, as opposed to simply turning some live mature trees into large snags or large downed logs. Indeed, one of the authors of North et al. (2009), Dr. William Zielinski, repeatedly states in the GSNM Science Consistency Review Report (on pp. II-47 and II-48) that it was not the intention of North et al. (2009) to suggest or support the removal of mature trees 20-30 inches in diameter, that only a tiny portion of the GSNM is predicted to be affected by fire of any type in a given decade (making the need for such thinning unclear), and that such removal would be harmful to the Pacific fisher.

Declaration of Dr. Chad Hanson ¶ 9 (attached to Sierra Club GSNM Appeal as Exhibit E).

Intervenors have also asserted that a 20 inch diameter limit is arbitrary, but that this limit is too high. Scientific data has shown that fuel treatments are effective at an 8 inch diameter limit, even without tree removal. *See* Sierra Club Appeal, pp. 17-21.

E. Support for prioritizing managed fire over mechanical treatments from the Scientific Advisory Board

The Forest Service has provided the best kind of rationale for prioritizing managed fire, whether wildfire or prescribed fire, over mechanical treatments: a consensus science advisory from its Scientific Advisory Board (SAB). The GSNM Plan states:

Advisory IV, Restoration of the Natural Fire Regime, and Advisory XXVIII, Decision Tree, from the Scientific Advisory Board, advise that a decision tree be developed to help determine which methods of forest

restoration and maintenance should apply at different locations (The Scientific Advisory Board 2003).

This decision tree (shown on the following page) will be used for each site-specific project proposed in the Monument. The desire to return the Monument to natural cycles and processes, including a natural fire interval, makes managed wildfire the preferred tool to accomplish ecological restoration and maintenance

GSNM Plan, p. 80. As the SAB Advisory explains:

The Scientific Advisory Board, recognizing the central importance of finding a logical and defensible balance between the use of prescribed fire and mechanical thinning (including hand thinning), issued Advisory IV on August 1, 2001. Advisory IV advised the Forest Service to "[d]evelop a decision tree to help determine which methods of forest restoration and maintenance should apply at different locations" ([initial] DEIS Appendix F, pp. F-12 -- F-14). The Forest Service did not supply such a decision tree in the DEIS, believing instead that the recommended decision tree "would be most applicable at the implementation phase" (Appendix F, p. F-3).

The Monument proclamation's statement that tree cutting is allowed "... only if clearly needed for ecological restoration and maintenance or public safety" implies that prescribed fire is to be the default forest management tool, therefore meaning that use of mechanical treatments is limited to instances when prescribed fire alone cannot meet goals for "ecological restoration and maintenance or public safety."

SAB Advisory XXVIII.

We wholeheartedly concur with this recommendation, and we applaud the Forest Service for following it.

For Sierra Club and Sequoia ForestKeeper,



René Voss

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