



Appeal Pursuant to 36 CFR § 215

To:

**Appeal Deciding Officer
Kevin B. Elliott, Forest Supervisor
Sequoia National Forest,
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Western Watersheds Project, Sequoia
ForestKeeper, and the Tehipite Chapter of
the Sierra Club

Appellants

v.

John Exline, Sequoia National Forest
Responsible Official

) **Appeal of the August 3, 2012 Decision**
) **Notice, Sampson Grazing Allotment**
) **Renewal Project, Sequoia National Forest,**
) **Giant Sequoia National Monument,**
) **Finding of No Significance Impact, and**
) **Environmental Assessment.**

)
) Responsible Official: John D. Exline,
) District Ranger, Hume Lake Ranger Station,
) Sequoia National Forest.

)
) Appeal Deciding Officer: Kevin B. Elliott,
) Forest Supervisor, Sequoia National Forest.

)
) Date: September 17, 2012
)
)

Appellants:

LEAD APPELLANT

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**Appeal
and
Statement of Reasons
Pursuant to 36 CFR § 215**

September 17, 2012

Dear Supervisor Elliott:

Western Watersheds Project, Sequoia ForestKeeper, and the Tehipite Chapter of the Sierra Club (“Appellants”) hereby appeal the August 3, 2012 decision for the Sampson Grazing Allotment Renewal Project made by District Ranger John D. Exline of the Hume Lake Ranger District, Sequoia National Forest. Appellants are appealing this decision based on the substantive and procedural grounds laid out in the statement of reasons below.

This appeal is consistent with 36 C.F.R. § 215.11 and is based upon written comments submitted by Appellants during the initial scoping period, extensive and detailed comments on the draft environmental assessment, conversations with agency staff, and the submission of relevant scientific articles. This appeal is consistent with 36 C.F.R. § 215.14 (Appeal Content) because it relies on specific evidence demonstrating why the August 3, 2012 Decision Notice for the Sampson Grazing Allotment Renewal Project should be reversed by the Appeal Deciding Officer.

Appellants are appealing this decision because their members use and enjoy the public land of the western states, including the project area, for a variety of reasons including scientific and educational pursuits, solitude, spiritual renewal, bird watching, hiking, wildlife viewing, photography, and other forms of recreation. We are concerned about the harmful effects this decision will have on these activities, as well as on the biotic and abiotic integrity of this allotment.

Statement of Standing

Western Watersheds Project is dedicated to protecting and improving wildlife habitat, riparian areas, water quality, and other resources and ecological values of the public lands of the American West through education, scientific study, public policy initiatives, and litigation. Western Watersheds Project has offices in California, Arizona, Colorado, Idaho, Montana, New Mexico, Utah and Wyoming and over 1,400 members nationwide. Western Watersheds Project is devoted, in part, to assisting the U.S. Forest Service to make management decisions in the best public interest. Western Watersheds Project staff and members use and enjoy the public lands, including the lands at issue here, and its wildlife, cultural and natural resources for health, recreational, scientific, aesthetic, educational, and other purposes. Western Watersheds Project submitted scoping comments for this project on June 15, 2010 and submitted comments on the Environmental Assessment on June 29, 2012.

Sequoia ForestKeeper is a non-profit conservation corporation whose mission is to protect and restore the ecosystems of the Southern Sierra Nevada including Sequoia National Forest through monitoring, enforcement, education, and litigation. Sequoia ForestKeeper and its nearly 800 members and supporters have vital interests in protection of wildlife and imperiled species that occur on the public lands in the Sequoia National Forest. Sequoia ForestKeeper submitted scoping comments on this project on May 31, 2010 and June 15, 2010, and submitted comments on the Environmental Assessment on June 29, 2012.

The Tehipite Chapter of the Sierra Club is made up of members of the Sierra Club residing in Fresno, Madera, Mariposa, and Merced Counties. The Sierra Club is the oldest conservation organization in the United States, with over one million members, friends and supporters. The Tehipite Chapter of the Sierra Club includes over 1,700 members in central California. Traditionally, this chapter has been actively involved in formulating management policies of public lands and in the preservation of local areas such as the Kings River Special Management Area, Monarch Wilderness; the Ansel Adams Wilderness; the Jenny Lakes Wilderness; the Giant Sequoia National Monument; and Sequoia, Kings Canyon, and Yosemite National Parks. Many Tehipite Chapter members live in areas that will be directly and indirectly affected by the Sampson Grazing Allotment Project. The Tehipite Chapter of the Sierra Club submitted comments on the project Environmental Assessment on June 29, 2012.

In summary, Appellants Western Watersheds Project, Sequoia ForestKeeper, and the Tehipite Chapter of the Sierra Club submitted substantive comments during the project process. On June 29, 2012, Appellants jointly submitted extensive comments on the Environmental Assessment (“EA”) for the project in a June 29, 2012 comment letter. Accordingly, all Appellants have standing to bring this appeal pursuant to 36 CFR § 215.13. This appeal is timely because it is being filed within 45 days after the publication of the legal notice of decision in the newspaper of record. That notice was published on August 7, 2012 which means the deadline for submission of this appeal is September 21, 2012.

Introduction

The Sampson Grazing Allotment includes approximately 16,705 acres on National Forest System lands (17,293 gross acres including private in-holdings), located in Townships 12-13 South and Ranges 26-27 East, Mount Diablo Base and Meridian on the Sequoia National Forest Hume Lake Ranger District. It is in Fresno County, approximately 30 air miles east of Fresno, California. Approximately half of this allotment is within the portion of Kings River Special Management Area and the Giant Sequoia National Monument (“GSNM”). Allotment lands outside the GSNM boundary also include a portion of the Oat Mountain roadless area. On August 3, 2012, District Ranger Exline signed a Decision Notice authorizing 200 cow-calf pairs to graze February through September on the Sampson Allotment.

Statement of Reasons

As set forth below, the environmental review for the proposed project fails to comply with the National Environmental Policy Act (“NEPA”), which requires an environmental impact statement (“EIS”) based on the significant impacts of this project on both an individual and cumulative basis. As Appellants demonstrate below, the EA for this project is deeply flawed. The purpose and need for the project is overly narrow, the range of alternatives is inadequate, and the Forest Service has failed to take the requisite hard look at the project’s environmental effects. The project will have negative or unknown effects on important sensitive resources including Monument objects of interest. For these reasons the Forest cannot conclude that this project will have no significant impact. Instead, the Forest must prepare an EIS so that the environmental effects of this project can be fully disclosed to the public and the decisionmaker. In approving this project, the Ranger District chose to limit analysis and responsive consideration for this project to an environmental assessment (“EA”), rather than a legally necessary EIS despite the fact that this project meets criteria for preparation of an EIS under the CEQ Regulations. See 40 C.F.R. § 1508.27. Additionally, the EA did not adequately address direct, indirect and cumulative impacts of the project. Further, the Forest failed to consider or to analyze reasonable alternatives that could reduce the significance of negative impacts without fully eliminating livestock grazing within the project area.

In addition, this project does not comply with the National Forest Management Act (“NFMA”), 16 USC 1600 et seq., and its implementing regulations, including failure to follow the Sequoia Forest Plan, failure to assess direct, indirect, and cumulative impacts to sensitive wildlife species and management indicator species, failure to monitor populations of management indicator species, failure to maintain diversity and insure viability of animal species, failure to avoid actions that will produce a substantial and permanent impairment of the productivity of the land, and failure to consider and use the best available science.

Furthermore, the project does not comply with the Antiquities Act because it fails to fully protect objects of interest identified in the 2000 Presidential Proclamation establishing the GSNM.

Appellants incorporate, in their entirety, by reference and as an attachment to this appeal all points raised in their May 31, 2010 and June 16, 2010 scoping comments letters, and in their June 29, 2012 comment letter on the Environmental Assessment for the project. Appellants hereby incorporate those comments into this Appeal as specific points of Appeal of this decision as if they were repeated in full herein.

Please note that all references cited in the text of this appeal were raised in our various comments and were made available to the Forest Service. The size and number of studies made sending them to the Ranger District by e-mail problematic. Accordingly, we posted all the studies referenced in our comments on the Forest Service’s Region 5 FTP site for inclusion in the project record at the following location: <ftp://ftp2.fs.fed.us/incoming/r5/Science>

A. THE PROJECT’S ENVIRONMENTAL REVIEW DOES NOT COMPLY WITH NEPA

1. The Purpose and Need Statement is So Overly Narrow, it Constrains the Range of Alternatives and Predetermines the Outcome of the Environmental Analysis in Violation of NEPA.

The NEPA Implementing Regulations require that “The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13. In our scoping and comment letters, we asked the Forest to clearly state the purpose and need for this project. In the Decision Notice (“DN”), the District Ranger states at page 1,

Forest Service direction is to issue, modify or reissue permits authorizing grazing on National Forest System lands. The grazing permit for Sampson Allotment is near the end of its term. Therefore, the purpose and need of this project is to reauthorize livestock grazing in a manner consistent with applicable management direction.

The environmental assessment (EA) documents the analysis of alternatives to meet the need to determine whether to reauthorize livestock grazing.

The Forest has ignored our requests for a clearly stated purpose and need for the project. Whilst the Forest Service’s proposed action may be to re-authorize grazing on this allotment, the Forest’s actual purpose and need appears to be to respond to a request to graze livestock on the allotment, assuming such a request was made. The decisions to be made here are: (1) whether or not grazing should be authorized on these public lands, and (2) if so under what conditions.

The Ninth Circuit Court holds that the purpose and need cannot be so narrow that only one alternative will work. *See City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (“[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.”); *see also Nat’l Parks & Conservation Ass’n v. BLM*, 586 F.3d 735, 748 (9th Cir. 2009) (holding that the BLM defined its objectives in unreasonably narrow terms, circumventing this “proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives”); *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997) (noting that “[o]ne obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose and need so slender as to define competing reasonable alternatives out of consideration (and even out of existence).”). That unfortunately is the situation here. The Forest has only analyzed two alternatives, no action (i.e. no grazing) and the proposed action. But because the purpose and need is “**to reauthorize livestock grazing** in a manner consistent with applicable management direction”, only the proposed action can meet that purpose since the no grazing alternative does not reauthorize grazing by private interests. Indeed, the Forest specifically admits in the EA that

the “no grazing” alternative does not address the stated purpose and need. EA at 25. Because the Forest has construed the stated purpose and need such that only the proposed action will meet that purpose and need, the stated purpose and need is so overly narrow that it constrains the analysis towards a predetermined decision in clear violation of NEPA.

The Ranger District has also ignored the additional concern we raised with respect to the purpose and need, that being the Forest’s obligation to incorporate its statutory need to protect the Monument’s objects of interest into the purpose and need statement.

The Giant Sequoia National Monument (“GSNM”) was created by presidential proclamation in 2000, for the "purpose of protecting the objects . . . within the boundaries of the . . . Giant Sequoia National Monument." The Forest’s actions must be consistent with this purpose.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Giant Sequoia National Monument, for the purpose of protecting the objects identified in the above preceding paragraphs, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described on the map entitled "Proposed Giant Sequoia National Monument" attached to and forming a part of this proclamation.

65 Fed. Reg. at 24097 (emphasis added).

The Proclamation is dominant above all other claimed authorities, “the national monument shall be the dominant reservation.” *Id.* at 24098.

Further, the 2000 Proclamation states, “Laws, regulations, and policies pertaining to administration by the Department of Agriculture of grazing permits and timber sales under contract as of the date of this proclamation on National Forest System lands within the boundaries of the monument shall continue to apply to lands within the monument.” 65 Fed. Reg. 24095, 24098 (April 25, 2000). The grazing permit that was in effect for the Sampson Allotment is ending. EA at 5. Under the plain language of the Proclamation, the measure that allowed continuation of grazing permits and timber sales under contract as of the date of the Proclamation does not apply to the new permit.

The Forest must incorporate its statutory need to protect the Monument’s objects of interest into the purpose and need statement. Its failure to do so, constitutes a further violation of NEPA.

2. The Range of Alternatives is Inadequate, a Violation of the National Environmental Policy Act.

The NEPA implementing regulations refer to the selection and review of alternatives as “the heart” of the environmental review. 40 C.F.R. § 1502.14. Comparison of the alternatives

will help “sharply defin[e] the issues and providing a clear basis for choice among options by the decision maker and the public.” *Id.* The regulations provide clear guidelines on how to select alternatives:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

Id.

In this case, the Forest considered only two alternatives - action and no action. However, the Forest claims that the no action alternative (i.e. no grazing) would not meet the stated purpose and need (which is specifically to take action!), and so has analyzed only one viable alternative. Despite our requests to do so, the Ranger District has failed to consider an alternative that would protect all monument objects of interest (such as restricting use on certain areas of the allotment) and would meet the purpose and need. Instead, it dismissed this perfectly reasonable alternative and analyzed only a single alternative - the proposed action - that actually addressed the stated purpose and need. The Ranger District's failure to analyze any grazing alternatives is a clear violation of NEPA.

Furthermore, there is nothing in the Presidential Proclamation statement that exempts the Forest from its obligation to consider alternative livestock management in its planning efforts. Indeed, the Proclamation language is clear that “Laws, regulations, and policies pertaining to administration by the Department of Agriculture of grazing permits ... shall continue to apply to lands within the monument.” 65 Fed. Reg. at 24098. Similar language in other Monument Proclamations has not absolved agencies from considering alternatives that comply with other laws and regulations. *Western Watersheds Project v. Salazar*, 2011 WL 4526746 (D.Idaho).

Under these circumstances, the EIS's failure to consider any alternative that would have reduced grazing violates NEPA's requirement, discussed above, that it "rigorously explore" all "reasonable alternatives." In addition, the refusal to analyze a "no grazing" alternative was arbitrary and capricious. The BLM based its refusal on its interpretation of the Proclamation that banning grazing would be "inconsistent" with its language. There is, however, no language in the Proclamation forbidding a consideration of a "no grazing" alternative. The Proclamation simply states that present laws "shall continue to apply with regard to the lands in the Monument administered by the [BLM]." *See Proclamation 7373*. The "present law" at the time the Proclamation was signed was that the

BLM had the authority to "reclassify and withdraw range land from grazing use." *Public Lands Counsel v. Babbitt*, 529 U.S. 728, 742, 120 S. Ct. 1815, 146 L. Ed. 2d 753 (2000). Accordingly, the BLM is free to consider a "no-grazing" alternative in Monument lands. No contrary language appears in the Proclamation. Thus, even applying the highest level of deference to the BLM's interpretation, the Court finds that it is incorrect as a matter of law. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

W. Watersheds Project v. Salazar, 2011 U.S. Dist. LEXIS 111728, 39-40 (D. Idaho 2011).

The same reasoning applies to Appellants' proffered alternative that would protect all monument objects of interest (such as restricting use on certain areas of the allotment). NEPA, the Antiquities Act, NFMA, and FLPMA were all in effect in 2000 when the Proclamation was issued. The Forest's failure to consider any alternative management direction for grazing in the NEPA analysis that fully protects the Monument and Monument objects of interest is a clear violation of NEPA.

3. The Forest Service Failed to Take a Hard Look at the Direct and Indirect Environmental Impacts of this Project.

a. The Forest Service Violated NEPA by Failing to Take a Hard Look at Impacts to Inventoried Roadless Areas.

The analyses must do more than simply mention individual Roadless Areas, but also must disclose, consider, and analyze the potential, actual, and cumulative effects on their Roadless characteristics.

In this case, the allotment boundary includes portions of the Kings River and the Oat Mountain Inventoried Roadless Areas ("IRA"). In response to concerns we raised that the Forest Service analyze the impacts of the proposed actions on special designated areas such as the Kings River IRA, the Forest Service responded, "The KRSMA designation supersedes the Kings River Inventoried Roadless Area designation by force of law so there is no need for additional analysis of wilderness quality and value in this project." EA at 8. We had pointed out in our comment letter that the Ranger District **had failed to even mention the existence of the Oat Mountain Roadless Area** in the EA let alone analyze the impacts of livestock grazing to it.

The Ranger District responded in the Response to Comments at 2:

Discussion of the Oat Mountain IRA was inadvertently omitted so the Sampson Errata provides the current direction. In summary, 2/3 of this area is outside the project area, and Oat Mountain is a Further Planning Area under the 1988 Sequoia National Forest Land and Resource Management Plan (LRMP). It is under-utilized in terms of grazing, and no proposal to designate any portion of this area as wilderness has occurred to date (See Errata for Sampson Grazing Allotment Renewal Project).

The Errata states,

On page 2, insert the following paragraphs immediately after Table 1:

The second Roadless Area Review Evaluation (RARE II) identified the Oat Mountain area as a Further Planning Area (FPA). The Oat Mountain FPA is located along the main drainage of the Kings River immediately southeast of Pine Flat Reservoir and extends east and south along Forest Road 12S01 toward Pine Ridge. The private lands forms the boundary west and south of the FPA. Approximately 1/3 of the FPA is within the Sampson Grazing Allotment project area.

According to the 1988 Sequoia National Forest Land and Resource Management Plan FEIS, Appendix C (1988 FEIS Appendix C) the grazing improvements such as watering troughs, spring developments, and drift fence have little effect on the area's apparent naturalness. Only a portion of these improvements are in the Sampson Allotment. In 1988 across the entire FPA the AUMs totaled 1,600 within three grazing allotments: Oat Mountain, White Deer/Delilah, and Sampson. At that time, the available forage was not being fully utilized. Currently only two of the three allotments, Oat Mountain and Sampson, are under permit and both have maintained or reduced the AUMs since 1988. The Oat Mountain FPA was recommended as a Further Planning Area by the RARE II Final EIS. Oat Mountain FPA has not appeared in any proposed wilderness designations to date.

The Record of Decision for the 1988 Sequoia National Forest Land and Resource Management Plan (LRMP) states:

“It should be noted that the Kings River FPA is that area included as the Special Management Area in recently enacted Kings River Wild and Scenic River legislation. Following evaluation in the DEIS, it was determined that none of the Further Planning Areas (Dennison, Moses, Oat Mountain, and Scodies) in the National Forest had any outstanding attributes/characteristics that would warrant adding them to the [National Wilderness Preservation] System. I find no new information that would support a change in the original recommendation to release these areas for multiple-use management purposes. Therefore, no additional National Forest wilderness will be recommended under this Plan.” (1988 LRMP ROD page 19)

This mention of the Roadless Areas in the *Errata* and *Response to Comments* is welcome but it does not absolve the Ranger District from its failure to analyze the direct, indirect, and cumulative impacts that its grazing decision for Sampson Allotment will have on these IRA. Simply stating the obvious fact that neither IRA has yet been designated as wilderness does not constitute an analysis of the effects on their Roadless Character.

As we stated in our comments, the Forest Service seems unaware that the Ninth Circuit has held that NEPA requires that it analyze the effects of its proposed actions on the human environment including IRAs. See *Lands Council v. Martin*, 529 F.3d 1219, 1231 (9th Cir. 2008) (“we hold that ‘the possibility of future wilderness classification triggers, at the very least, an

obligation on the part of the agency to disclose the fact that development will affect a 5,000 acre roadless area,' ..., or will affect an area of sufficient size as to make practicable its preservation and use in an unimpaired condition.” (quoting *Smith v. United States Forest Service*, 33 F.3d 1072, 1078 (9th Cir.1994)).

We also pointed out that there is a need to provide analysis of the impacts of the project on wilderness quality and values because the more recent Giant Sequoia National Monument Proclamation of 2000 adds an additional layer of protection for those portions of the allotment that are in both the KRSMA and the Monument.

The Forest Service needs to conduct a full NEPA analysis of the direct, indirect, and cumulative impacts of each alternative on roadless character and wilderness values for both the Oat Mountain IRA and the King’s River IRA. The analysis should evaluate the impacts of existing and proposed range developments (EA at 13 and D-28) as well as impacts from past, current and future livestock use. The January 12, 2001 Roadless Rule defines “roadless area characteristics” as including:

- (1) High quality or undisturbed soil, water, and air;
- (2) Sources of public drinking water;
- (3) Diversity of plant and animal communities;
- (4) Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land;
- (5) Primitive, semi-primitive nonmotorized and semi-primitive motorized classes of dispersed recreation;
- (6) Reference landscapes;
- (7) Natural appearing landscapes with high scenic quality;
- (8) Traditional cultural properties and sacred sites; and
- (9) Other locally identified unique characteristics.

36 C.F.R. § 294.11. The Ranger District’s failure to take the requisite “hard look” at the effects of its decision on the Oat Mountain and King’s River Roadless Areas in the face of specific requests from the public to do so, constitutes an egregious violation of NEPA.

b. The Forest Service Violated NEPA by Failing to Take a Hard Look at the Allotment’s Capability and Suitability for Livestock Grazing.

Capable lands, specific to grazing, are lands accessible to livestock, producing forage or having inherent forage-producing capability, and able to withstand grazing on a sustained basis under reasonable management practices. Range Specialist Report at 2.

In the Sampson Allotment, the Forest Service has determined that there are areas of the allotment that are not suitable for grazing:

A capability and suitability analysis was conducted in order to verify Forest level suitability determinations. This analysis follows guidance contained in Appendix K of the Sierra Nevada Forest Plan Amendment (USDA Forest Service 2001). The determination

was made using Forest GIS files, NRCS soil data (NRCS 2011), and information verified on the allotment. Lands found incapable or not suitable are not necessarily excluded from grazing however quantifying this amount, and identifying the locations can help administrative staff determine where to focus their management efforts.

EA at 19 (our emphasis added). The Forest Service has therefore determined the capability and suitability of the allotment and found, given current circumstances, that sustained grazing is not possible on all parts of the allotment including parts of the Monument. However, the proposed action would allow grazing on the unsuitable parts of the Monument, which could harm Monument objects of interest rather than protect them. The Giant Sequoia National Monument was created for the “purpose of protecting the objects . . . within the boundaries of the . . . Giant Sequoia National Monument.” 65 Fed. Reg. at 24097. The proposed action is thus inconsistent with this purpose because the agency is arbitrarily enabling lands it has deemed incapable or not suitable for grazing to be used for grazing. The Forest’s failure to protect all areas and objects in the Monument violates both the law and the public trust.

Furthermore, the Forest admits that it does not know the current carrying capacity of the allotment:

Because detailed mapping and analysis of forage production would be cost prohibitive, capacity is based on historical use to standard. Livestock grazing has occurred in this allotment for over one hundred years. Stocking rates and seasons of use have been adjusted and the timing, intensity, frequency, and duration of grazing have been continually refined over time to account for annual as well as long-term variations in climate and resource condition. Utilization standards are currently being met on the allotment and use is expected to continue at or near the same level. Therefore current permitted use appears to fall within a reasonable estimate of range capacity.

EA at 20. Because the agency does not know the current carrying capacity of the lands in the Monument, the proposed action cannot be consistent with the Giant Sequoia National Monument’s stated purpose “of protecting the objects . . . within the boundaries of the . . . Giant Sequoia National Monument.” 65 Fed. Reg. at 24097. The EA provides no data showing that historic utilization on this allotment is below the current carrying capacity. The fact that utilization is currently meeting standards is irrelevant since it simply means that the cattle have not eaten more forage than is permitted (or, since the Forest uses the word “currently”, at least not recently). Therefore, the EA’s conclusion about capacity is arbitrary and capricious, in violation of NEPA, NFMA, and the GSNM proclamation.

c. The Forest Service Violated NEPA by Failing to Take a Hard Look at the Impacts of Livestock Grazing On Sensitive Species and Their Habitats.

(i) Great Gray Owl, *Strix nebulosa*

The great gray owl is a Forest Service sensitive species, a California endangered species, and a Monument object of interest that is known to be impacted by livestock grazing. Livestock

grazing can remove cover necessary for prey species and can degrade meadows, thereby lowering water tables and reducing productivity of grasses and forbs that are food sources for prey. Sampson Allotment includes the only designated great gray owl Protected Activity Center (“PAC”) on Sequoia National Forest (Wildlife Biological Evaluation (“BE”) at 11) and on the GSNM. This great gray owl PAC consists of approximately 63 acres around the nesting stand but does not include associated great gray owl foraging habitat.

The southern Sierra Nevada owls are now recognized as a distinct subspecies, *Strix nebulosa yosemitensis* (Hull *et al.*, 2010¹). This great gray owl occurrence on Sampson Allotment is of considerable scientific significance since it is the southernmost extent occurrence of the species (Sears, 2006). Loss of this occurrence could result in the bird being lost from Sequoia National Forest and the Giant Sequoia National Monument and also would result in a significant range-contraction for the sub-species and for the species as a whole.

The Wildlife Specialist report (“Wildlife BE”) states,

It is uncertain how grazing may affect small mammal populations and foraging habitat quality for great gray owls (USDA 2001). An indirect effect of grazing could be a reduction in vole and pocket gopher populations due to a loss of vegetation cover. A loss of prey resources could adversely affect reproduction or lead to increased mortality.

Wildlife BE at 18. Despite this acknowledged uncertainty of grazing effects on the great grey owls’ prey species and any failure to identify where that foraging habitat is on the allotment, the Wildlife BE concluded: “It is my determination that the proposed action in the Sampson Grazing Allotment Renewal Project may affect individuals, but is not likely to result in a trend toward Federal listing or loss of viability of great gray owls”. Wildlife BE at 22. **This is an absolutely inappropriate conclusion to draw when the affected population consists of a single pair that clearly cannot survive the loss of any individuals.** It also ignores the fact that subspecies and Distinct Population Segments are entities eligible for listing under the Endangered Species Act; and, in fact the analysis failed to mention Hull *et al.*, 2011 although we provide the paper. Moreover, the great gray owl is included in the Monument Proclamation as an object of interest. The Forest Service should be striving to protect and conserve the Monument’s great gray owl population since this an object of interest protected by the Proclamation.

The Forest must take a serious, hard look at impacts of grazing on Sampson Allotment on the great gray owl. Because of the scientific significance and importance of this small population, and the known risks posed by grazing, the Forest must ensure that adequate mitigations and safeguards are in place to protect this imperiled species. Without this hard look, any assertions that the project “is not likely to result in a trend toward Federal listing or loss of viability” is simply arbitrary and capricious.

(ii) Pacific Fisher, *Martes pennanti*

¹ Hull, J. M., Keane, J. J., Savage, W. K., Godwin, S. A., Shafer, J. A., Jepsen, E. P., Gerhardt, R., Stermer, C. and Ernest, H. B. 2010. Range-wide genetic differentiation among North American great gray owls (*Strix nebulosa*) reveals a distinct lineage restricted to the Sierra Nevada, California. *Molecular Phylogenetics and Evolution*, 56(1): 212-21.

The Pacific fisher is a candidate species for listing and is a Monument object of interest. But nowhere in the EA are the Pacific fisher and the impacts to the Pacific fisher or its habitat discussed in the context of it being a Monument object. The EA is inconsistent with the requirements of the Proclamation and Judge Breyer's October 11, 2006 ruling requiring that the Monument be managed consistent with the Monument Proclamation.

According to the EA, livestock grazing in the Sampson Allotment may be responsible for habitat degradation and a reduction in prey species available to the Pacific fisher:

Indirectly, grazing may degrade owl or fisher foraging habitat by inhibiting regeneration of oak trees and other hardwoods and the growth of herbaceous and shrub vegetation that is needed to support an adequate prey base, especially wood rats.

EA at 43. Because livestock grazing in the Sampson Allotment may be responsible for habitat degradation and a reduction in prey species available to the Pacific fisher, it will not protect the Pacific fisher or its habitat as required under the Proclamation. In fact, enabling grazing on the allotment could further degrade foraging habitat for the Pacific fisher on GSNM. The Ranger District's failure to take the requisite hard look at the direct and indirect impacts of livestock grazing on the Pacific fisher as a Monument object of interest is a violation of NEPA.

(iii) Western Pond Turtle, *Actinemys marmorata*

The Western pond turtle is a Region 5 sensitive species that occurs on the allotment. The Region has admitted that grazing is a primary threat to western pond turtles on Sierra Nevada national forests. EA at 17. The EA also admits, "Primary and secondary use areas are the most likely areas to have impacts on aquatic habitats and therefore on aquatic species like foothill yellow-legged frogs and southwestern pond turtles. Of the approximately 23 miles of perennial streams in the Sampson Allotment, 2.5 miles are within primary use areas and 4.8 miles within secondary use areas. In addition, Mill Flat Creek Critical Aquatic Refuge (CAR) was designated in part specifically for southwestern pond turtles, protecting 22,565 acres of habitat. Most of the Sampson Grazing Allotment falls within this CAR. Standard and guidelines for CARs to maintain water quality and sensitive species include locating new facilities for gathering livestock outside of the refuge where feasible." EA at 40. "Holland (1991) notes that turtle habitat may be altered by activity of livestock, and individuals subject to crushing." EA at 40.

Despite these potential impacts, the EA concludes that grazing will have no measurable effects on the pond turtle, because "[t]he use of BMPs for this project is expected to eliminate measurable effects on foothill yellow-legged frog and southwestern pond turtle habitat." Id. But neither the EA nor the Wildlife BE explains how any of these BMPs will actually protect the pond turtles on the Allotment. Nor do they explain how these BMPs, which allow cattle to graze in almost all the pond turtle habitat on the allotment, will eliminate measurable effects on the turtles such as being crushed by cattle.

Further, the Mill Flat Creek Critical Aquatic Refuge guidance is to: "Maintain and restore habitat to support viable populations of native and desired non-native plant, invertebrate, and

vertebrate riparian-dependent species.” The goal for the CAR is not simply to minimize harm to the habitat but to support a viable population of western pond turtles.

Because livestock grazing in the Sampson Allotment may be responsible for altered turtle habitat and individuals subject to crushing, it will not protect the turtle or its habitat as required under the Proclamation. The Ranger District’s failure to take the requisite hard look at the direct and indirect impacts of livestock grazing on the turtle as one of the Monument’s “moisture-loving species” and “less visible and less familiar forms of life,” which are Monument objects of interest, is a violation of NEPA.

The Ranger District must take a serious, hard look at the **site-specific** impacts of grazing on Sampson Allotment on western pond turtles and their habitat. Without this hard look, any assertions that the project “is not likely to result in a trend toward Federal listing or loss of viability” is simply arbitrary and capricious.

(iv) California Spotted Owl, *Strix occidentalis occidentalis*

The California spotted owl is a California Department of Fish and Game species of special concern, a Region 5 sensitive species, and an object of interest cited in the 2000 Presidential Proclamation. The Sierra Nevada Framework’s California spotted owl conservation strategy seeks to maintain habitat capable of supporting existing owl populations, stabilize current population declines, and provide increases in owl habitat over time.

Livestock grazing affects the California spotted owl by reducing or eliminating riparian vegetation utilized by the owl in portions of its range; by altering forest structure and fire regimes in both ponderosa pine and mixed conifer forest types; and by reducing the density of potential spotted owl prey items (Davis and Gould, 2008²).

Coarse woody debris is an important feature of California spotted owl nesting and foraging habitats (Call et al., 1992³). The owl’s habitat consists of dense forest (>40% canopy closure), with a preference for stands with ≥ 2 layers, but open enough to allow for observation and flying space to attack prey. Substantial amounts of dead woody debris are desirable. BE at 28. The Sampson Allotment BE at page 28 clearly states that livestock grazing “may affect individuals, but not likely to result in a trend toward Federal listing or loss of viability.”

The NEPA analysis provides no analysis of how the proposed action will achieve the aims of the conservation strategy of maintaining the current habitat in spotted owl territories on the allotment and of managing the general forest areas to maintain and increase the amount of suitable spotted owl habitat. Nor does the EA establish how the proposed action will protect this monument object especially when the BE says it “may affect individuals.”

² Davis, J. N. and Gould Jr., G. I. 2008. California Spotted Owl (*Strix occidentalis occidentalis*). In: California Bird Species of Special Concern: A ranked assessment of species, subspecies, and distinct populations of birds of immediate conservation concern in California. Studies of Western Birds 1. Shuford, W. D., and Gardali, T., eds. Western Field Ornithologists, Camarillo, California, and California Department of Fish and Game, Sacramento. Pp. 227-233.

³ Call, D. R., Gutiérrez, R. J. and Verner, J. 1992. Foraging habitat and home-range characteristics of California spotted owls in the Sierra Nevada. The Condor, 94(4): 880-888.

(v) **Valley Elderberry Longhorn Beetle, *Desmocerus californicus dimorphus***

The Valley elderberry longhorn beetle was listed as threatened in 1980 and a Recovery Plan issued in 1984. The Recovery Plan recognized that livestock grazing is a threat to the species (USFWS, 1984⁴). We raised a number of specific issues with respect to the beetle in our comments that the District Ranger has simply failed to address.

The Ranger District claims that the Valley elderberry longhorn beetle will not be impacted because cattle impact smaller branches and younger host plants than the beetles use. EA at 37. But, as we pointed out in our comments, Barr (1991⁵) found exit holes on a number of Valley elderberry branches with a diameter less than 1 inch, and concluded that the number of small diameter branches used by the beetle may be underestimated in surveys because of insufficient time for larval development and pupation.

The EA admits that at least 16 acres of Valley elderberry longhorn beetle habitat are in livestock concentrated use areas. Table 15, EA at 37. This is almost half of the 35 acres of concentrated use area the Forest admits to being on the allotment.

Further, as the EA at 38 points out, the Mill Flat Creek Critical Aquatic Refuge guidance is to, “Maintain and restore habitat to support viable populations of native and desired non-native plant, invertebrate, and vertebrate riparian-dependent species.” Therefore, the goal for the CAR is not simply to minimize harm to the habitat but is to support a viable population of beetles.

Independent of any findings in a U.S. Fish and Wildlife Service Biological Opinion or concurrence, as a federal agency the Forest Service is independently responsible for decisions affecting the listed species on this allotment. 16 U.S.C. § 1536(a)(1) & (2). The Forest Service must fully analyze potential impacts to the Valley elderberry longhorn beetle in its NEPA documents’ including potential impacts to the species recovery.

4. The Forest failed to prepare and complete an Environmental Impact Statement for a project with high potential to significantly and negatively affect the quality of the human environment and the overall ecosystem within and surrounding the project area.

NEPA requires the preparation of a detailed Environmental Impact Statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). To determine whether a project will have a significant effect, the Forest Service may prepare an EA. If the EA determines that there will be no significant effect, then an EIS need not be prepared. *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 972 (9th Cir. 2002). If the Forest Service finds that impacts are significant, however, an EIS is required. [*Id*]

⁴ USFWS. 1984. Valley Elderberry Longhorn Beetle Recovery Plan. United States Fish and Wildlife Service. Portland, Oregon. 62 pp.

⁵ Barr, C. B. 1991. The Distribution, Habitat, and Status of the Valley Elderberry Longhorn Beetle, *Desmocerus californicus dimorphus*. USFWS. 144 pp. (including appendices).

The Forest Service cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment. See *Alaska Ctr. for Env't v. United States Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999). Instead, the Forest Service must take a “hard look” at the potential impacts of a proposed project, and, if it opts not to prepare an EIS, it must put forth a “convincing statement of reasons” that explain why the project will impact the environment no more than insignificantly. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

Further, an “EIS must be prepared if substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.” *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). Thus, the public need not show that significant effects will in fact occur, but rather must raise “substantial questions whether a project may have a significant effect” for an EIS to be required. *Id.* at 1150. See also *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992).

In determining whether a federal action requires an EIS because it significantly affects the quality of the human environment, an agency must consider what “significantly” means. The regulations give it two components: context and intensity. 40 C.F.R. § 1508.27. Context refers to the setting in which the proposed action takes place. 40 C.F.R. § 1508.27(a). Intensity means “the severity of the impact.” *Id.* § 1508.27(b). Here, the Forest Service must prepare an EIS for this project based on these factors.

In considering the severity of the potential environmental impact, a reviewing agency may consider up to ten factors that help inform the “significance” of a project, including the degree of impact on public health and safety, impacts on unique characteristics of the geographic area, including proximity to an ecologically sensitive area, whether the action bears some relationship to other actions with individually insignificant but cumulatively significant impacts, the level of uncertainty of the risk and to what degree it involves unique or unknown risks, the level of controversy surrounding the environmental effects, and the degree to which the project may establish a precedent for future actions with significant effects. 40 C.F.R. § 1508.27(b) (2), (3), (4), (5), (6), & (7). Any one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.

As set forth in this appeal, this grazing project has the potential for significant impacts in a number of respects, any one of which would require the preparation of an EIS.

i. The Project Has Significant Impacts and Requires the Preparation of an EIS

In considering the “significance” of a project – and whether an EIS is required, the Forest Service must consider “Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.” 40 C.F.R. § 1508.27(b)(1). As Appellants outline herein, the project will have adverse effects on special status species and their habitats, cultural resources, roadless area characteristics, and GSNM Monument objects of interest.

ii. The Unique characteristics of the Area Requires the Preparation of an EIS

In considering the “significance” of a project - and whether an EIS is required, the Forest Service must also consider “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas..” 40 C.F.R. § 1508.27(b)(3).

The Sampson Grazing Allotment includes approximately 16,705 acres on National Forest System lands (17,293 gross acres including private in-holdings), located on the Hume Lake Ranger District. Approximately half of this allotment is within the Kings River Special Management Area and the Giant Sequoia National Monument. Allotment lands outside the GSNM boundary also include a portion of the Oat Mountain roadless area. The character of each of these areas will be affected by the Decision.

The allotment also includes the only designated great gray owl PAC on the Sequoia National Forest and on the GSNM. Livestock grazing impacts the great gray owl, yet the proposed action will continue to allow cattle to graze on the Sampson Allotment at risk of losing individuals of the only breeding pair of this imperiled species on the Sequoia National Forest and on the GSNM.

Sampson Allotment also provides important habitat for other special status species that are not only Forest Service Sensitive species but are also GSNM objects of interest that are to be protected under the 2000 Presidential Proclamation. Additionally, Native American cultural sites occur within the allotment that are objects of interest and that may be impacted by cattle grazing.

The grazing action proposed in the EA will directly and indirectly negatively impact the ecology of this critical area, and will affect the character of portions of two Roadless areas, and the GSNM. The Decision cannot be considered anything but a “significant” impact to the human environment.

iii. The Controversy Over the Grazing Project Requires the Preparation of an EIS.

In considering the "significance" of a project - and whether an EIS is required, the Forest Service must also consider the "degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). The grazing decision is highly controversial for several reasons. First, the grazing decision and the project EA tier off the stale 1988 Sequoia National Forest LRMP. Secondly, it ignores recent Federal court rulings related to grazing management and NEPA analysis on National Monuments and grazing affects on designated roadless areas. And, thirdly, it relies on an indefensible interpretation of relevant language in the 2000 GSNM Presidential Proclamation. In the light of clear legal uncertainty, this decision is highly controversial.

iv. An EIS is Required Due to the Highly Uncertain and Unique Risks Posed by this Project

40 CFR § 1508.27 (b) (5) states, “the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks” should be a factor in determining whether the potential effects of a project are significant. Similarly, court decisions find that “general statements about ‘possible effects’ and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998). Nor is it appropriate to defer consideration of cumulative impacts to a future date since “NEPA requires consideration of the potential impact of an action before the action takes place.” *Id.*

The proposed project poses multiple risks, including but not limited to impacts to public health and safety, sensitive and rare animals and plants, endangered species, GSNM objects of interest, and the spread of noxious and invasive weeds. The project may compromise the viability of the southernmost population of great gray owl, *Strix nebulosa yosemitensis*. In fact, the Forest Service admits that “It is uncertain how grazing may affect small mammal populations and foraging habitat quality for great gray owls (USDA 2001).” Wildlife BE at 18.

Because the effect on imperiled species and to Monument objects of interest are highly uncertain or the risks unknown, the project must be analyzed with an EIS.

v. An EIS is Required Due to the Potential for Cumulative Impacts From this Project.

In considering the "significance" of a project - and whether an EIS is required, the Forest Service must also consider "whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7). As is discussed in this appeal, the project will have cumulative significant impacts on Forest Resources. The project therefore requires an EIS.

vi. An EIS is Required for this Project Since the Project Threatens to Violate Federal and State Law.

40 CFR § 1508.27 (b) (10) states that “whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment” should be a factor in determining whether the potential effects of a project are significant. Here, the project threatens to violate a number of federal laws, as discussed in this appeal, including:

- The NFMA requirement that Forest Service insure “continued diversity of plant and animal communities and the continued viability of populations of existing native and desired nonnative vertebrate species in the planning area.” 16 U.S.C. § 1604(g)(3)(B); 36 C.F.R. § 219.19.

- The Antiquities Act requirement that agencies protect Monument objects of interest. The Forest Service has no authorization to adversely impact Monument objects of interest when it can be avoided.

vii. Appellants Have Previously Requested that the Forest Service Prepare an EIS.

In their May 10, 2010 and June 15, 2010 scoping letters, Appellants cautioned the Ranger District, that an EIS is required for this project. Appellants reiterated this demand in their June 29, 2012 comment letter on the EA, “The purpose and need for the project is overly narrow, the range of alternatives is inadequate, and the Forest Service has failed to take the requisite hard look at the project’s environmental effects. The project will have negative or unknown effects on important sensitive resources including Monument objects of interest. For these reasons the Forest cannot conclude that this project will have no significant impact. Instead, the Forest must prepare an Environmental Impact Statement so that the environmental effects of this project can be fully disclosed to the public and the decisionmaker.”

As outlined in this appeal, the grazing Decision is based on an EA and associated documents that do little to assuage either the significant harm to the environment posed by the proposed action or its controversial nature. The project poses significant risks to the human environment and requires the preparation of an EIS as requested by the Appellants.

B. THE EA AND PROJECT VIOLATES THE NATIONAL FOREST MANAGEMENT ACT AND APPLICABLE NFMA PLANNING DOCUMENTS.

As set forth below, the EA and Project also violate the National Forest Management Act (“NFMA”), 16 USC 1600 et seq., and its implementing regulations, regional and forest plans.

1. The Forest Service is Not Ensuring the Viability of Sensitive Species Adversely Affected by Grazing.

The National Forest Management Act directs the Forest Service to “provide for diversity of plant and animal communities” in the planning process. 16 USC 1604(g)(3)(B). Moreover, all projects and activities must comply with the requisite forest plan. *See* 16 U.S.C. § 1604(i). Management Direction from the 1988 Sequoia National Forest Plan requires the Forest Service to “Maintain or increase habitat capabilities to support viable populations of wildlife and fish species (CFR 36 219.19) in cooperation with the California Department of Fish and Game.” SQNF Plan at 4-3. The Forest Service’s regulations that implement this statutory mandate require that “[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species.” 36 CFR 219.19. “For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.” *Id.* With respect to Forest Service designated sensitive species the agency is further required “to insure their viability and to preclude trends toward endangerment that would result in the need for Federal listing.” (Forest Service Manual 2672.1.) Through these steps in

this process, NFMA imposes substantive constraints on the management of forest lands to insure biological diversity. See *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1379-1380 (9th Cir. 1998). This project violates NFMA because the Forest Service is not insuring the viability of sensitive forest species adversely affected by grazing including the great grey owl.

The great gray owl, *Strix nebulosa*, is a Forest Service sensitive species, a California endangered species, and a Monument object of interest that is known to be impacted by livestock grazing. The southern Sierra Nevada owls are now recognized as a distinct subspecies, *Strix nebulosa yosemitensis* (Hull *et al.*, 2010). This great gray owl occurrence on Sampson is of considerable scientific significance. It is the southernmost extent occurrence of the species (Sears, 2006⁶). Loss of this occurrence could result in the species being lost from Sequoia National Forest and the Giant Sequoia National Monument and also would result in a significant range-contraction for the species. Livestock grazing can remove cover necessary for prey species and can degrade meadows, thereby lowering water tables and reducing productivity of grasses and forbs that are food sources for prey. Sampson Allotment includes the only designated great gray owl PAC on Sequoia National Forest (Wildlife Biological Evaluation (“BE”) at 11). The Wildlife BE states,

A great gray owl Protected Activity Center (PAC) of approximately 63 acres falls entirely within the Sampson Allotment. Standard and guidelines for this PAC include a limited operating period for vegetation management activities but does not apply directly to livestock grazing. Restrictions on grazing in PACs relate to meadows, which do not exist at this PAC.

Wildlife BE at 19. This PAC thus seems to include only the nesting stand. However, as the Wildlife BE notes, livestock grazing on the allotment may result in reduced prey levels, which may adversely affect the owls:

It is uncertain how grazing may affect small mammal populations and foraging habitat quality for great gray owls (USDA 2001). An indirect effect of grazing could be a reduction in vole and pocket gopher populations due to a loss of vegetation cover. A loss of prey resources could adversely affect reproduction or lead to increased mortality.

Wildlife BE at 18. The Wildlife Biological Evaluation concluded:

It is my determination that the proposed action in the Sampson Grazing Allotment Renewal Project may affect individuals, but is not likely to result in a trend toward Federal listing or loss of viability of great gray owls.

Wildlife BE at 22. This is an absolutely inappropriate conclusion to draw when the population consists of a single pair and clearly cannot survive the loss of any individuals at all. Loss of any individuals will compromise the species continued viability on the Forest in direct violation of NFMA.

⁶ Sears, C. L. 2006. Assessing Distribution, Habitat Suitability, and Site Occupancy of Great Gray Owls (*Strix nebulosa*) in California. M.S. Thesis, University of California, Davis.

C. THE EA AND PROJECT DO NOT COMPLY WITH THE MONUMENT PROCLAMATION AND VIOLATE THE ANTIQUITIES ACT.

The Giant Sequoia National Monument (“GSNM”) was created by presidential proclamation in 2000, for the “purpose of protecting the objects . . . within the boundaries of the . . . Giant Sequoia National Monument.” 65 Fed. Reg. at 24097. The Proclamation for the GSNM identifies the significant resources that merit National Monument status and calls for their protection. Referred to as “objects of interest,” these resources include the landscapes of the area, as well as numerous sensitive species and many archaeological, geological, historic, cultural, and scenic attributes.

Unfortunately, many aspects of the Decision/EA do not comply with the purpose and specific language of the Proclamation.

1. The Forest Service Must Manage the Monument Lands to Protect the Values For Which The Monument Was Established but The Ranger District Has Failed to Give this Mission Adequate Priority.

The Forest Service’s responsibility to protect Monument objects must guide both project environmental analysis and any management decisions made. Pursuant to the legal authority granted by Congress in the Antiquities Act of 1906 (16 U.S.C. §§ 431-433), the President designated GSNM for the explicit purpose of protecting and preserving identified historic and scientific objects. Proclamation No. 7393. Therefore, the standard approach to multiple-use management does not apply to this Monument, and any effort to adopt such a management approach to the detriment of its natural and cultural values would be in violation of the Presidential Proclamation. The Forest must manage the GSNM for the protection and preservation of its natural, historic, scenic, and scientific values, and only allow uses other than those needed for the protection of Monument objects when those uses do not conflict with the directives of the Proclamation.

In order to fully comply with the requirements of the Proclamation and the Antiquities Act, the Ranger District must ensure that the chosen alternative does not adversely impact Monument objects and demonstrate that it has complied with the prioritization of the protection of Monument objects over other uses. It has not done so in this case.

As we explained above, the Forest has an obligation to incorporate its statutory need to protect the Monument’s objects of interest into the purpose and need statement. The 2000 Presidential Proclamation for GSNM states, “Laws, regulations, and policies pertaining to administration by the Department of Agriculture of grazing permits and timber sales under contract as of the date of this proclamation on National Forest System lands within the boundaries of the monument shall continue to apply to lands within the monument.” 65 Fed. Reg. 24095, 24098 (April 25, 2000). The grazing permit that was in effect for the Sampson Allotment is ending. EA at 5. Under the plain language of the Proclamation, the measure that allowed continuation of grazing permits and timber sales under contract as of the date of the

Proclamation does not apply to the new permit. The Forest must incorporate its statutory need to protect the Monument's objects of interest into the purpose and need statement. It must choose an alternative that protects not harms monument objects.

Under the Proclamations and Antiquities Act all of the alternatives that apply to management of the Monument must conserve Monument resources first (and in particular those resources that are "objects of interest"), and then make other management decisions that do not interfere with the conservation of Monument resources. Thus, in order to comply with these requirements, the range of alternatives cannot include management decisions that will undermine protection of Monument objects in favor of other resources or uses, such as livestock grazing. Because the Ranger District failed to consider any alternative that would fully protect Monument objects of interest except for "no grazing" which the Forest has deemed not to meet the purpose and need for the project, the range of alternatives considered in the EA is not a reasonable range and is not consistent with the Monument Proclamation.

2. The Forest Service is knowingly Authorizing Actions that Harm and Do Not Protect Monument Objects of Interest.

The Antiquities Act and the 2000 Presidential Proclamation require that management of the Monument must conserve Monument resources first (and in particular those resources that are "objects of interest"), and then make other management decisions that do not interfere with the conservation of Monument resources. Agencies cannot issue decisions that would lead to negative and substantial impacts on Monument objects.

a. The Decision Will Harm Cultural Resources

The GSNM was created by presidential proclamation in 2000, for the "purpose of protecting the objects . . . within the boundaries of the . . . Giant Sequoia National Monument." 65 Fed. Reg. at 24097. These objects of interest include, "Archaeological sites such as lithic scatters, food-processing sites, rock shelters, village sites, petroglyphs, and pictographs are found in the monument. These sites have the potential to shed light on the roles of prehistoric peoples, including the role they played in shaping the ecosystems on which they depended." *Id.* at 24096.

As we pointed out in our comments, livestock grazing may have profound harmful impacts to archeological resources and cultural sites (Broadhead, 1999⁷; Osborn *et al.*, 1987⁸). Livestock, especially cattle, are known to impact archeological and cultural sites through a number of mechanisms including mechanical or physical impacts such as trampling, wallowing, and rubbing, dislodging and crushing artifacts; chemical impacts resulting from urine and feces; and, erosion impacts (Foster-Curley, 2003⁹).

⁷ Broadhead, W. 1999. Cattle, Control, and Conservation. *Cultural Resource Management*, 22: 31-32.

⁸ Osborn, A., Vetter, S., Hartley, R., Walsh, L. and Brown, J. 1987. Impacts of Domestic Livestock Grazing on the Archeological Resources of Capitol Reef National Park, Utah, pp. 1-136: Midwest Archeological Center Occasional Studies in Anthropology.

⁹ Foster-Curley, C. 2003. Damage Assessment Report, Yankee Jim Ranch Property Report prepared for Alturas Field Office, Bureau of Land Management. Alturas.

According to the Cultural Resource Specialist Report, only 3,891 acres of the allotment's 16,705 acres have been surveyed for cultural resources, i.e. 23% of the project area. The Forest Service proposes to mitigate any damage by exclosing any sites that show impacts. But that is an after-the-fact action that would occur when surveys have shown that damage is already evident. Absent full surveys of the allotment and the immediate closing of all cultural sites to grazing, the Forest Service cannot assure that its grazing decision is protecting these Monument objects of interest.

b. The Decision Does Not Protect the Great Gray Owl

The GSNM was created by presidential proclamation in 2000, for the "purpose of protecting the objects . . . within the boundaries of the . . . Giant Sequoia National Monument." 65 Fed. Reg. at 24097. These objects of interest include the great gray owl. The Forest Service must strive to protect and conserve the Monument's great gray owl population since this a protected object of interest.

Currently, there is only one known breeding pair of great gray owls on the monument and the PAC for that pair is on Sampson Allotment. The Forest Service acknowledges that the proposed action in the Sampson Grazing Allotment Renewal Project may affect individual great gray owls but concludes this is not likely to result in a trend toward Federal listing or loss of viability of great gray owls. Wildlife BE at 22. This is an entirely erroneous conclusion inappropriate conclusion for several reasons. First of all, the Antiquities Act does not allow the Forest to impact objects of interest but requires the Service to protect them. Secondly, when the known population consists of a single breeding pair, the population clearly cannot survive the loss of any individuals at all. Loss of a single individual will compromise the species continued viability on the Monument. The Forest Service is obligated to strive to protect and conserve the Monument's great gray owl population since this a protected object of interest and that consideration should have been the basis for any conclusion in the NEPA analysis.

c. The Decision Does Not Protect the Pacific Fisher

The Pacific fisher, *Martes pennanti*, is a candidate species for ESA listing and is one of the objects identified to be protected in the Monument. But nowhere in the EA are the Pacific fisher and the impacts to the Pacific fisher or its habitat discussed in the context of it being a Monument object. The EA is inconsistent with the requirements of the Proclamation and the Court ruling of 10-11-2006 requiring that the Monument be managed consistent with the Monument Proclamation.

According to the EA, livestock grazing in the Sampson Allotment may be responsible for habitat degradation and a reduction in prey species available to the Pacific fisher:

Indirectly, grazing may degrade owl or fisher foraging habitat by inhibiting regeneration of oak trees and other hardwoods and the growth of herbaceous and shrub vegetation that is needed to support an adequate prey base, especially wood rats.

EA at 43. Because livestock grazing in the Sampson Allotment may be responsible for habitat degradation and a reduction in prey species available to the Pacific fisher, it will not protect the Pacific fisher or its habitat as required by the Proclamation.

d. The Decision Does Not Protect the California Spotted Owl

The California spotted owl, *Strix occidentalis occidentalis*, is a California Department of Fish and Game species of special concern, a Region 5 sensitive species, and an object of interest cited in the 2000 Presidential Proclamation.

The Sierra Nevada Framework's California spotted owl conservation strategy seeks to maintain habitat capable of supporting existing owl populations, stabilize current population declines, and provide increases in owl habitat over time. This includes protecting and managing individual spotted owl home range core areas and managing the general forest outside of core areas to maintain and increase the amount of suitable spotted owl habitat. Livestock grazing affects the California spotted owl by reducing or eliminating riparian vegetation utilized by the owl in portions of its range; by altering forest structure and fire regimes in both ponderosa pine and mixed conifer forest types; and by reducing the density of potential spotted owl prey items (Davis and Gould, 2008). Coarse woody debris is an important feature of California spotted owl nesting and foraging habitats (Call *et al.*, 1992).

The NEPA analysis provides no analysis of how the proposed action will achieve the aims of the conservation strategy of maintaining the current habitat in spotted owl territories on the allotment and of managing the general forest areas to maintain and increase the amount of suitable spotted owl habitat. Nor does the EA establish how the proposed action will protect and not harm this Monument object of interest.

D. THE PROJECT FAILS TO PROTECT BIRDS PROTECTED UNDER THE MIGRATORY BIRD TREATY ACT.

Sampson Allotment is used by birds protected under the Migratory Bird Treaty Act ("MBTA"). The EA failed to mention either the MBTA or the *Migratory Landbird Conservation on the Sequoia National Forest* report (MLCSNF Report) that was prepared for the project although the latter was made available at our request and the report was appended to the District Ranger's Decision Notice. In that report, the Ranger District restricted its analysis of birds protected under the MBTA to fox sparrows, bald eagles, great gray owls, and spotted owls.

For the fox sparrow, the MLCSNF Report states, "Since the Sampson Grazing Allotment Project will result in a reduction in shrub ground cover class on less than 1% of existing shrubland habitat, this project will not alter the existing trend in the habitat, nor will it lead to a change in the distribution of fox sparrows across the Sierra Nevada bioregion (From Cordes 2011a)." MLCSNF Report at 2. For the two owl species, the MLCSNF Report states, "Indirectly, grazing may degrade foraging habitat by inhibiting regeneration of oak trees and other hardwoods and the growth of herbaceous and shrub vegetation that is needed to support an adequate prey base, especially wood rats. The loss of riparian vegetation to grazing and

trampling can negatively impact movement corridors. These indirect effects could lower reproductive success of the historic nesting pairs in the area, but are not likely to affect the greater population of either species.” MLCSNF Report at 2. The report then concludes, “The proposed Sampson Grazing Allotment Renewal Project will not adversely impact migratory landbird species or their associated habitats.” *Id.* (emphasis added).

However, as we reminded the Ranger District in our comments, the MBTA protects individual migratory birds and their nests, not populations. “Unless and except as permitted by regulations ... it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, ... any migratory bird, any part, nest, or egg of any such bird”. 16 USC Sec. 703(a). (emphasis added).

The Ranger District has relied on the incorrect threshold of significance for effects to migratory birds. It is not whether a proposed action will “lead to a change in the distribution” or “affect the greater population” but rather whether the proposed action complies with the take prohibition in the MBTA.

Furthermore, the MLCSNF Report cannot reasonably conclude that the project, “will not adversely impact migratory landbird species or their associated habitats” when it admits, only a paragraph earlier, that for two of the four considered birds, “grazing may degrade foraging habitat by inhibiting regeneration of oak trees and other hardwoods and the growth of herbaceous and shrub vegetation that is needed to support an adequate prey base, especially wood rats. The loss of riparian vegetation to grazing and trampling can negatively impact movement corridors.”

The conclusions reached in *Migratory Landbird Conservation* report for the project and the District Ranger’s claim, made in Appendix D Final Comments and Responses at 3 that “The Forest Service is protecting migratory birds”, are simply arbitrary and capricious.

E. THE DISTRICT RANGER’S DECISION VIOLATES THE APA.

The cumulative results of the NEPA, NFMA and Antiquities Act violations outlined above, and the failure to provide basic information required to understand how the decision was made constitute a violation of the Administrative Procedure Act. Any decision made on the basis of the project’s EA and supporting documents is arbitrary and capricious.

F. RELIEF REQUESTED

As set forth above, Appellants have shown that District Ranger Exline’s August 3, 2012 Decision for the Sampson Grazing Allotment Renewal Project is contrary to NEPA, NFMA, the APA, and to other applicable laws, rules, and regulations. The environmental review failed to consider critical information, use the best available science, consider all reasonable alternatives and assess environmental impacts as required by law.

Appellants request that the Appeal Deciding Officer vacate the District Ranger Exline's grazing decision and remand this project back to staff for the preparation of the required EIS in full compliance with applicable laws. Appellants also request the Appeal Deciding Officer to direct the Ranger District to develop and consider a reasonable range of alternatives to the proposed action, to do a more complete analysis of the project's direct, indirect, and cumulative effects on wildlife, heritage resources, wilderness quality lands, and botanical and other resources, the Giant Sequoia National Monument, and all Monument objects of interest as required by NEPA.

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Respectfully submitted,



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