

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

SIERRA CLUB through its TENNESSEE CHAPTER, )  
TENNESSEE HEARTWOOD, and HEARTWOOD, )  
 )  
Plaintiffs, )  
 )  
- against- )  
 )  
UNITED STATES FOREST SERVICE, an )  
agency of the United States Department of )  
Agriculture, )  
 )  
Defendant. )

Case No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**Nature of the Action**

1. The Tennessee Chapter of the Sierra Club, Tennessee Heartwood, and Heartwood (Conservation Groups) bring this action against the United States Forest Service (Defendant) for dismissing Conservation Groups’ administrative objection to the “Dinkey Project” and for approving that Project, which unlawfully authorizes high-impact commercial logging on steep, erosion-prone slopes along Tumbling Creek, a trout stream near the Ocoee River in the Cherokee National Forest. Conservation Groups seek declaratory relief vindicating their right to a proper agency hearing on management decisions affecting public lands and injunctive relief preventing unlawful impacts to soils, forests, and waters of the Cherokee National Forest.

2. Conservation Groups have raised concerns about the likely impacts of the Dinkey Project at every opportunity. Between December 2013, when the project was proposed, and August 2017, when Conservation Groups’ objection was unlawfully dismissed, Conservation Groups detailed their concerns in three written comment letters, informal correspondence with agency staff, and two formal, in-person meetings. In all these communications, Conservation

Groups' primary concern was that the Dinkey Project would cause erosion and soil loss, resulting in damage to the long-term productivity of the logged areas, degradation of the health and diversity of the forest, and sediment pollution of downstream waters. Conservation Groups' concerns were based on the known effects of recent Forest Service timber sales located on similar soils and slopes, which resulted in significant and unlawful impacts to soils, waters, and forests. Conservation Groups supported their comments with photographic and video evidence, scientific and legal authorities, and references to Defendant's own monitoring data and conclusions.

3. Despite Conservation Groups' well-supported comments and Defendant's own information, Defendant deliberately ignored the erosion risks exemplified by recent logging projects. Defendant did not disclose the unlawful erosion caused by recent timber sales or explain why the Dinkey project would not cause similar erosion problems.

4. Because Conservation Groups' chief concern was ignored, Conservation Groups filed a timely, detailed, 23-page administrative objection to the draft decision, again raising the same concerns. Conservation Groups' objection explained why the project as proposed was unwise, pointed out specific violations of law and policy, and proposed specific remedies.

5. Rather than responding substantively to Conservation Groups' objection as required, Defendant dismissed it without review, offering only that, "The objection does not provide sufficient information . . . for the reviewing officer to review." This finding was arbitrary and capricious and contrary to the plain language of the agency's regulations.

6. Defendant's improper dismissal was the "final administrative determination" of the Forest Service, with "no further administrative review . . . available." The dismissal therefore deprived Conservation Groups of the right to have their concerns addressed and resolved

administratively. Under Forest Service regulations, Conservation Groups are entitled to have their concerns heard and considered, whether those concerns relate merely to the wisdom or prudence of a decision or, more seriously, to claimed legal violations. Conservation Groups have been denied the right to challenge the wisdom of the Dinkey Project decision, and they have been forced to devote considerable time and other resources to prevent Defendant from unlawfully endangering public lands and hiding those risks from the public.

7. Conservation Groups therefore seek reversal of the dismissal of their objection, reversal of the decision approving the Dinkey Project, and an injunction forbidding the implementation of the Dinkey Project unless Defendant complies with the requirements of law.

#### **Jurisdiction and Venue**

8. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 (federal question) because this action arises under the laws of the United States, including the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; the National Forest Management Act, 16 U.S.C. § 1600 *et seq.*; and the United States Forest Service's Project-Level Predecisional Administrative Review Process regulations, 36 C.F.R. Part 218 (2013). This Court may issue a declaratory judgment and further relief under 28 U.S.C. §§ 2201 (declaratory relief) and 2202 (injunctive relief).

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because the Dinkey Project lies entirely within the Eastern District and a substantial part of the events or omissions giving rise to the claims herein occurred within this District. Venue is also proper in this Court pursuant 28 U.S.C. § 1391(e) because the Forest Service is an agency of the United States, the Forest Service maintains its office and records related to the Dinkey Project in this

District, Conservation Groups' members reside in this district, and the public lands and resources in question are located in this District.

10. Conservation Groups have exhausted their administrative remedies.

### **Parties**

11. Plaintiff Tennessee Chapter of the Sierra Club is a non-profit organization founded in 1973 operating throughout Tennessee. The Tennessee Chapter of the Sierra Club has approximately 105,500 members and supporters who reside in Tennessee. The Sierra Club is the nation's oldest and largest grassroots volunteer non-profit organization dedicated to improving the environment for the benefit of all people and their communities. The Tennessee Chapter has focused over the years on the protection of wilderness and public lands, including the Cherokee National Forest. The Tennessee Chapter was instrumental in achieving passage of the wilderness bill that protected the beloved Big Frog Wilderness area, whose eastern border is also the west bank of Tumbling Creek, contiguous with the Dinkey Project area.

12. Plaintiff Tennessee Heartwood is a non-profit organization founded in 2009 and located in Chattanooga, Tennessee. Tennessee Heartwood has approximately 100 members and supporters who reside in Tennessee. Tennessee Heartwood is dedicated to the protection and preservation of Tennessee's conservation heritage. Tennessee Heartwood focuses strongly on the Cherokee National Forest and the Land Between the Lakes National Recreation Area. Tennessee Heartwood also works to educate the public about its rights and responsibilities in participating in public lands management. This mission takes Tennessee Heartwood to locations across the country to train grassroots volunteers.

13. Plaintiff Heartwood is a non-profit regional environmental organization dedicated to protecting the public forests of Tennessee and other eastern states. Heartwood represents

approximately 1800 members, 43 of whom reside in Tennessee, and numerous member organizations who depend on public lands, including the Cherokee National Forest, for recreational, spiritual, and ecological purposes.

14. Conservation Groups' members are active participants in the management and conservation of the Cherokee National Forest, participating in forest management decisions through comments, site visits, monitoring, scientific analysis, research and education, and meetings with agency staff. Conservation Groups have been participating in the Dinkey Project since Defendant first proposed it in December 2013.

15. Conservation Groups bring this action on behalf of their members who visit, observe, photograph, work, volunteer, or otherwise use and enjoy the Dinkey Project area, surrounding forest lands, the Tumbling Creek watershed, and downstream areas. These members derive scientific, aesthetic, educational, professional, and recreational benefits from these areas and are harmed by Defendant's actions, which put these benefits at risk. Conservation Groups member(s) have observed and are aware of the negative impacts to forests, soils, and waters caused by logging in nearby portions of the Cherokee National Forest.

16. Conservation Groups' member(s) have hiked and taken photographs in the Dinkey Project area, including within the stands in which logging will occur; made scientific observations of the forests in the Dinkey Project area, including the stands in which logging will occur; fished in Tumbling Creek in the Dinkey Project area downstream from where logging will occur; enjoyed scenic driving in the Dinkey Project area, including roads from which stands that will be logged can be observed; and derived spiritual and aesthetic enjoyment from spending time in the Dinkey Project area, and intend to do so again in the future. If the Dinkey Project is

implemented, Conservation Groups' use and enjoyment of the Dinkey Project area would be harmed by the removal of forest, damage to soils, and sediment pollution to Tumbling Creek.

17. Conservation Groups have been forced to spend considerable time and have incurred significant expense, including travel and leave from work, as a result of Defendant's refusal to address their concerns in its environmental analysis of the Dinkey Project or in response to their administrative objection.

18. Conservation Groups are also harmed by Defendant's wasteful use of public funds. One of Defendant's primary responsibilities is restoration of damaged watersheds—soil and water—throughout the Cherokee National Forest. Forest users, including members of the Conservation Groups, are among the intended beneficiaries of this work and Conservation Group members use and enjoy National Forest lands, waters, roads, and trails that could benefit from restoration. By taking actions that harm soil and water resources, Defendant assumes the cost of remediating those harms, thereby leaving fewer funds available to improve watershed conditions throughout the Cherokee National Forest.

19. Defendant United States Forest Service is a federal agency located within the Department of Agriculture, and is charged with managing the public lands and resources in the Cherokee National Forest, including the Dinkey project area, in accordance and compliance with applicable federal and state laws and regulations.

### **Legal Background**

#### **National Environmental Policy Act**

20. The National Environmental Policy Act (NEPA) requires the preparation of an Environmental Impact Statement (EIS) for federal actions that may significantly affect the environment. 42 U.S.C. § 4332.

21. The Forest Service may prepare an Environmental Assessment (EA) in order to determine whether an EIS is required. If the EA reveals that the action may have significant impacts, then an EIS must be prepared. Otherwise, the action may proceed with a Decision Notice (DN) and Finding of No Significant Impact (FONSI). 36 C.F.R. § 218.2.

22. An EA should be brief relative to an EIS, but it must “provide sufficient evidence and analysis for determining whether to prepare an [EIS].” 40 C.F.R. § 1508.9. The EA must discuss, among other things, “the environmental impacts of the proposed action and alternatives.” *Id.* In order to determine whether an EIS is required, the EA must assess and disclose the degree of risk that harm will occur. 40 C.F.R. § 1508.27(b)(5).

23. When preparing an EA, an agency may make commitments to avoid or minimize harms that might otherwise be significant, thereby allowing the project to proceed with a “mitigated FONSI” rather than an EIS. The agency must, however, provide a reasoned explanation demonstrating that the mitigation measures will be effective to prevent significant impacts.

### **Predecisional Objection Regulations**

24. In order to seek judicial review of a Forest Service decision, a plaintiff must first exhaust his or her administrative remedies by participating in a predecisional objection process. 36 C.F.R. §§ 218.1; 218.14(b).

25. This objection process is intended to provide “a full and fair opportunity for concerns to be raised and considered on a project-by-project basis.” 36 C.F.R. § 218.14(a). The process allows the Forest Service to “consider[] public concerns early on, before a decision is made,” which “aligns with the Forest Service’s collaborative approach to forest management and

increases the likelihood of resolving those concerns resulting in better, more informed decisions.” 78 Fed. Reg. 18481, 18483 (2013).

26. To be eligible to file an objection, the objector must “have submitted timely, specific written comments regarding a proposed project or activity . . . during any designated opportunity for public comment,” including “during scoping or any other instance where the responsible official seeks written comments.” 36 C.F.R. § 218.5.

27. If an objection is properly filed, the challenged project cannot proceed “until the reviewing officer has responded in writing” and “all concerns and instructions identified by the reviewing officer in the objection response have been addressed.” 36 C.F.R. § 218.12.

28. To be properly filed, an objection must meet several requirements, including, as relevant:

A description of those aspects of the proposed project addressed by the objection, including specific issues related to the proposed project; if applicable, how the objector believes the environmental analysis or draft decision specifically violates law, regulation, or policy; suggested remedies that would resolve the objection; supporting reasons for the reviewing officer to consider; and . . .

A statement that demonstrates the connection between prior specific written comments on the particular proposed project or activity and the content of the objection . . . .

36 C.F.R. § 218.8(d)(5)-(6).

29. If an objection “does not provide sufficient information as required by § 218.8(d)(5) or (6) for the reviewing officer to review,” it must be “set aside.” 36 C.F.R. § 218.10. On the other hand, if an objection meets the regulation’s minimum requirements, the reviewing officer must respond to the objection in writing before the project can proceed. 36 C.F.R. §§ 218.11, 218.12.

30. A decision to “set aside” a citizen objection “must state the reasons for not reviewing the objection” and provide “prompt written notice” to the objector. 36 C.F.R. § 218.10. Such a decision is a final agency action and is reviewable under the APA.

### **National Forest Management Act**

31. The National Forest Management Act (NFMA) creates a two-stage process for management decisions: broad “forest plans” and subsequent site-specific “projects.” 16 U.S.C. § 1604. As relevant to this litigation, NFMA requires that forest plans “insure that timber will be harvested . . . only where . . . soil, slope, or other watershed conditions will not be irreversibly damaged” and that regeneration harvests are “carried out in a manner consistent with the protection of soil [and] watershed” resources. 16 U.S.C. § 1604(g)(3).

32. To implement these NEPA requirements, the Cherokee National Forest Revised Land and Resources Management Plan (Forest Plan) contains the following goals, objectives, and standards:

- a. “Design and implement projects in ways that will maintain or improve the long-term productive capacity of the soil resource.” Forest Plan at 24.
- b. “During mechanical disturbance on all soils dedicated to growing forest vegetation, the organic layers, topsoil, and root mat will be left in place over 85 percent of a project area.” Forest Plan at 24.
- c. “Resource management activities [including logging] that may affect soil and/or water quality will implement Tennessee Best Management Practices (BMPs) as a minimum to achieve soil and water quality objectives. When [Forest Plan] standards exceed BMPs, standards shall take precedence over Tennessee BMPs.” Forest Plan at 25.

33. All site-specific projects must be consistent with the Forest Plan. 16 U.S.C. § 1604(i).

### **Administrative Procedure Act**

34. The Administrative Procedure Act (APA) requires a reviewing court to set aside any final agency action where it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” or “without observance of procedure required by law.” 5 U.S.C. § 706. Questions of law and procedure are reviewed *de novo*, while predicate findings of fact are reviewed under the arbitrary and capricious standard. Under the arbitrary and capricious standard, the reviewing court must look at whether the agency relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a different view or the product of agency expertise. The reviewing court may not supply a reasoned basis for the agency’s action that the agency itself has not given.

### **Factual Background**

#### **Physical Setting and Forest Plan Requirements**

35. The Cherokee National Forest, located in East Tennessee, includes over 650,000 acres and is subdivided into four Districts. The southernmost of the four is known as the Ocoee District.

36. The Ocoee District is known for its recreational opportunities, including water-based activities like rafting, fishing, swimming, and wading, as well as trails for mountain biking, horseback riding, and hiking, wilderness recreation, and roads for scenic driving.

37. Each District of the Cherokee National Forest is subdivided into management areas or “prescriptions,” set forth in the Forest Plan, some of which allow commercial logging

38. Each District is further subdivided into administrative “compartments” composed of “stands.” Compartment and stand numbers are used to locate specific areas of the forest where timber harvest or other management activities may be proposed.

39. The Dinkey Project area is located in the Ocoee District along Tumbling Creek, a trout stream that flows into the Ocoee River. Over 100 years ago, much of the Ocoee River watershed was denuded by toxic pollution from the Copperhill smelter operations, with barren soils that massively eroded, sending sediment downstream. As a result, portions of the Ocoee River are considered “impaired” under state law due to sedimentation. Tumbling Creek was just outside of the affected area, however, and is “fully supporting its designated uses” under state law. Dinkey Environmental Assessment (Dinkey EA) at 83, 98 (May 2017).

40. The mountainous terrain in the Dinkey Project area contains many steep slopes with a variety of soil types, some of which are considered “soils of concern” due to severe erosion hazards.

41. Removal of soil’s vegetative cover and organic layer can lead to soil movement. Soil movement caused by water is known as erosion. When eroded soil moves into waters, it is known as sediment pollution. Forest Plan EIS at 50.

42. Soil is a finite resource because it develops very slowly. Forest Plan EIS at 45. One inch of productive soil takes between 200 and 1000 years to form. Id. at 49. Loss of topsoil is considered a “long-term effect to soil productivity.” Id. at 49.

43. “Skid trails” are one of the primary sources of soil disturbance associated with timber harvest. Forest Plan EIS at 60. Conventional, rubber-tired logging equipment cannot

operate safely on slopes greater than 45% (24.2 degrees), and commercial harvest using such equipment therefore requires the construction of “full bench” skid trails, which involves excavation of soil to create a flat road surface across the sides of steep slopes. Dinkey EA at 86 and App’x F at 7.

### **Recent, Damaging Timber Sales: Island Creek and Hopper Branch**

44. According to Defendant’s own monitoring data and reports, recent timber sales in the Ocoee District of the Cherokee National Forest have caused damage to soils in violation of the 15% disturbance limitation imposed by the Forest Plan, national and regional Forest Service direction, and adopted by Defendant as the threshold for soil impairment for those timber sales. Of the nine timber sale units monitored by Forest Service staff in 2015, four exceeded the 15% limitation. Two of these four units were part of the Island Creek timber sale (also known as the Hogback Project), and the other two were part of the Hopper Branch timber sale. As documented in photographs submitted by Conservation Groups in comments and their objection to the Dinkey Project, these sites have been heavily damaged, with a total loss of topsoil and very sparse regrowth of vegetation on disturbed areas.

45. Units 1 and 7 of the Island Creek timber sale contained soils considered by Defendant to be “soils of concern” due to severe erosion hazard and severe equipment limitations.

46. Before implementing the Island Creek timber sale, the Forest Service prepared an Environmental Assessment pursuant to NEPA (the Hogback EA), which stated:

a. “Mitigation measures would be employed to reduce the amount of erosion that could be possible, and to reduce the amount of off-site movement of soil into stream channels.”

b. “Actual ground disturbance . . . would occur on about ten percent of the acres harvested.”

47. Defendant found that the Hogback Project would comply with Forest Plan requirements to implement Tennessee BMPs and all other relevant Forest Plan standards.

48. In 2015, monitoring of three sale units from the Island Creek timber sale revealed that two units violated the 15% threshold (27% and 17%, respectively), and the third exceeded the predicted 10% level (14%). More than a third of the soil disturbance (by acre) took place in the interior of the stand, not on skid trails or log landings.

49. Also in 2015, monitoring of three sale units from the Hopper Branch timber sale similarly revealed that two units violated the 15% threshold (22% and 17%, respectively), and the third exceeded the predicted 10% level (13%).

50. The monitoring report analyzing the Island Creek and Hopper Branch timber sales concluded that “exceedances were related to excessive skid trails and landings” and, in the future, exceedances could be “reduced through a reduction in skid trail density.”

51. The monitoring report further opined that a lighter harvest method (thinning) had helped to prevent exceedances on other units, as compared to the heavy regeneration harvests on units that were out of compliance.

52. The monitoring report concluded that in order to prevent future exceedances, projects should include “[i]ncreased attention to BMPs and soils of concern in . . . planning, silvicultural prescription, effects analysis, decision, marking, layout, contract administration, implementation, and closure of timber sale units.”

53. Defendant’s staff opined that the problems associated with Island Creek were caused by “stacked skid trails”—*i.e.*, excavated trails running parallel across a steep slope.

Defendant's staff proposed two alternatives that would not require skid trails on steep slopes: cable (also known as "skyline") logging, which does not involve excavation on steep slopes, or harvesting "only as far down the hill as was feasible to retrieve via cable winching to the ridge." Email from Forest Hydrologist to Ocoee District Ranger and others (December 31, 2015).

54. Conservation Groups first became aware of the problems associated with the Island Creek timber sale in January 2013.

55. The next logging project initiated on the Ocoee District after Conservation Groups learned of the erosion caused by the Island Creek timber sale was the Dinkey Project.

### **The Dinkey Project**

56. On December 9, 2013, Defendant released a scoping notice for the Dinkey Project. The Dinkey Project area includes 3,734 acres in the upper Ocoee River watershed, mostly in the Tumbling Creek watershed. The Dinkey Project proposed tree cutting on 1,194.4 acres—almost one third of the total area. Of those acres, 234 were proposed for heavy "regeneration" logging, including clearcutting; 517 were proposed for thinning; and 443.4 were proposed for noncommercial treatments. Most of the commercial harvest (154 acres of regeneration and 328 acres of thinning) was concentrated in two compartments, which together border either side of the same short, 1.25 mile reach of Tumbling Creek.

57. Conservation Groups reviewed the proposal and realized that the Dinkey Project, like the Island Creek timber sale, involved heavy logging on steep slopes with soils of concern. On January 13, 2014, Conservation Groups timely submitted specific written comments on the Dinkey Project in a 14-page letter (Scoping Comments). Conservation Groups' Scoping Comments.

58. The Scoping Comments explained the relevance of the Hogback Project (Island Creek timber sale) to the Dinkey Project. Specifically, Conservation Groups noted that Compartments 362 and 365 have similar risk factors to the stands that caused unacceptable impacts in the Island Creek timber sale—namely, steep slopes, severely erosive soils, and heavy logging methods. Conservation Groups named five stands (Compartment 362, stands 31 and 37, and Compartment 365, stands 3, 4, and 6) and asked that they not be logged: “[T]he best course of action for stands such as the ones we have been citing is to leave them alone.” If logging were to occur, Conservation Groups argued it should be reduced in scale, be limited to ridgetops in order to avoid steep slopes, and be preceded by a “vigorous analysis that details strong mitigation measures that would prevent the almost inevitable erosion that would occur.”

59. Related to the risk of erosion, Conservation Groups cautioned that the proposed logging could cause sediment pollution in Tumbling Creek. Conservation Groups requested a “rigorous analysis of possible sediment loading” and a “thorough mitigation plan” to address these risks.

60. Conservation Groups also questioned the putative ecological benefits of the logging project—namely, replacing existing trees with oak and shortleaf pine trees. Conservation Groups supported these comments by identifying elements of diverse forest communities that are present in the project area (*e.g.*, white ash, cherry trees, and large old trees) which would be lost if logged and replaced by young oak and pine forest.

61. On February 6, 2014, Cherokee National Forest requested additional comment on the Dinkey Project.

62. Conservation Groups timely submitted additional written comments on February 23, 2014 (Supplemental Scoping Comments).

63. The Supplemental Scoping Comments directly quoted informal correspondence with Defendant's staff, in which Defendant's staff had acknowledged the relevance of "[f]ield inspections [of] . . . nearby areas of previous silvicultural treatment with similar slope/soil conditions" to determine "if erosion was known to be a problem during previous timber harvests." In response, the Supplemental Scoping Comments explained, "We have seen logging on similar slopes and soil types in this district that included shelterwood cuts where 'bare mineral soil' was exposed in places, both on and off temporary roads. We can only presume that this will be the case in this proposal, particularly considering that some of the sloping and total elevation change will be more pronounced than at the places we saw, and that at least one stand (C362 stand 37) will be clearcut, which is a more significant level of disturbance than a shelterwood cut."

64. On February 12, 2016, during the same period of time Defendant was undertaking monitoring and analysis of the Island Creek and Hopper Branch timber sales, Defendant released a Draft Environmental Assessment for the Dinkey Project (Dinkey Draft EA).

65. Nowhere in the Dinkey Draft EA did Defendant disclose the exceedances of the 15% threshold by of the Island Creek and Hopper Branch timber sales or discuss those timber sales' similarities to the Dinkey Project activities with respect to soils, slopes, topography, and type of logging.

66. To implement the Forest Plan and regional and national Forest Service direction, Defendant adopted the 15% soil disturbance threshold as the measure of soil impairment for the Dinkey Project: "soil impairment does not occur when . . . [a]t least 85 percent of an activity area is left in a condition of acceptable potential soil productivity following land management activities." Dinkey Draft EA at 80-82.

67. Based on an assumption that disturbance would occur only on skid trails, log landings, and temporary roads, the Dinkey Draft EA estimated that the project would disturb the soil by use of logging equipment on 112 acres, or “approximately 15% of the acres in the treatment stands.” Dinkey Draft EA at 90-91.

68. The Dinkey Draft EA considered the effects of two “action” alternatives. Alternative B, which Defendant chose, included an “extended streamside management zone”—*i.e.*, a buffer prohibiting the operation of equipment close to waters. Alternative C would have prohibited construction of skid trails on slopes greater than 45%. Comparing these alternatives, Defendant concluded without explanation that “[p]otential impacts to soils from timber harvest in Alternative C would be the same as Alternative B.” Dinkey Draft EA at 96. Defendant did not disclose that excessive erosion in the Island Creek and Hopper Branch timber sales was caused by skid trails on steep slopes or provide any reason why either Alternative B or C could be expected to prevent similar erosion problems in the Dinkey Project.

69. On March 11, 2016, Conservation Groups submitted timely written comments on the Dinkey Draft EA (Conservation Groups’ EA Comments).

70. Conservation Groups’ EA Comments appealed to Defendant to make changes to the Dinkey Project to reflect the “lessons learned from problems happening on recent logging at Island Creek/Hogback.” Conservation Groups specifically asked that Defendant drop stands 31 and 37 in Compartment 362, noting that they were especially concerning because they shared the “same concave characteristics” as one of the problematic Island Creek units.

71. Conservation Groups also raised a cost/benefit argument. Conservation Groups questioned the supposed ecological benefits of the logging in stands 31 and 37 and concluded that “[t]he risks are too high, and the challenges too substantial.” Conservation Groups argued,

“based on the example of similar sites only a few miles away,” that logging these stands was not worth “incurring effects that will be costly to mitigate, to the point of incurring a negative return financially and ecologically.”

72. Conservation Groups argued that proposed mitigation measures were unlikely to be successful (“an array of mitigation challenges, some of which may be difficult or impossible to meet”) and that the logging was too heavy (asking that stands be dropped or “at least curtailing the levels of treatment significantly”).

73. In September 2016, Defendant released its 2015 Monitoring and Evaluation Report, which revealed the severe erosion problems caused by the Island Creek and Hopper Branch timber sales.

74. In February 2017, Conservation Groups’ representative attended a meeting hosted by Defendant. The purpose of this meeting was to make sure that Defendant’s staff understood the concerns raised in written comments. At this meeting, Conservation Groups’ representative and other participants who had commented on the Draft EA stakeholders reiterated concerns regarding logging on steep slopes with highly erosive soils in light of the problems caused by Hogback/Island Creek.

75. In June 2017, Defendant released a Draft Decision Notice (DN) and Finding of No Significant Impact (FONSI) and EA for the Dinkey Project. Defendant decided to implement its proposed action (Alternative B).

76. Nowhere in the Draft DN and FONSI, the EA, or any appendices or supplemental reports, did Defendant disclose the failures of the Island Creek and Hopper Branch timber sales under similar circumstances, either by name or by reference to its own 2015 Monitoring and Evaluation Report.

77. Nowhere in the Draft DN and FONSI, the EA, or any appendices or supplemental reports, did Defendant explain why the failures had occurred in the Island Creek and Hopper Branch timber sales.

78. Defendant acknowledged that “[m]itigations are required to minimize erosion and soil loss” on soils of concern. Dinkey EA at 85. Nevertheless, nowhere in the Draft DN and FONSI, the EA, or any appendices or supplemental reports, did Defendant assess the need for mitigation measures that were previously suggested by Defendant’s staff to avoid such failures and explain why those or other mitigation measures would prevent erosion similar to that caused by the Island Creek and Hopper Branch timber sales—*e.g.*, reduced skid trail density, changing the logging plans to a lighter harvest method, skyline logging, or harvesting only as far down the ridge as could be reached by cable. To the extent that Defendant’s decision did include mitigation measures (such as an “extended” streamside buffer zone, covering bare ground with mulch, and optional soil testing), no analysis whatsoever was offered to explain how these particular measures were responsive to the lessons learned from the Island Creek and Hopper Branch timber sales.

79. Nowhere in the DN, FONSI, EA, or any appendices or supplemental reports, including Appendix F (“Response to Comments), did Defendant address Conservation Groups’ comments explaining the similarities between the Dinkey Project and the Island Creek and Hopper Branch timber sales or attempt to distinguish the Dinkey Project from those projects.

80. On July 11, 2017, Conservation Groups attended a meeting with Defendant’s staff during which Defendant’s staff acknowledged that the Island Creek timber sale caused erosion problems because stacked skid trails were used in order to allow conventional rubber-tired

logging equipment to operate on steep slopes. Defendant's staff were not willing to discuss the implications of this information for the Dinkey Project.

### **Conservation Groups' Objection to the Dinkey Project**

81. On July 17, 2017, Conservation Groups filed a timely objection to the Dinkey Project.

82. Conservation Groups' objection included a statement demonstrating the connection between prior specific written comments on this project and the content of the objection, to wit: "Our objections . . . restate concerns that we have made throughout the process for this project. Our concerns have been communicated in comments on the scoping phase, a series of questions directed to agency personnel via phone and email, comments made after the publication of the Environmental Analysis (EA), as well as February 2017 and July 2017 meetings with Cherokee rangers."

83. Conservation Groups' objection described the aspects of the project addressed by the objection. As relevant to this litigation, Conservation Groups' objection discussed the following specific issues related to the proposed action:

a. Conservation Groups again argued that the mitigation measures included in the Dinkey Project were unlikely to protect soil and water resources in Compartments 362 and 365 in light of the Hogback Project and other project failures (pages 7-9).

b. Conservation Groups again argued that the putative ecological benefits of the proposed logging are speculative and do not outweigh the likely financial and ecological costs (pages 10-17).

84. Conservation Groups' objection included, as applicable, how the environmental analysis and draft decision specifically violated law, regulation, or policy. Conservation Groups'

objection also explained why aspects of the Dinkey Project that may not have specifically violated law, regulation, or policy were nonetheless unwise or imprudent and should be reconsidered.

a. With respect to the adequacy of mitigation, Conservation Groups offered extensive discussion of how Defendant's decision violates NEPA by failing to disclose the failures of past projects and declining to explain why the Dinkey Project would avoid such failures (pages 2-5, 9). Conservation Groups further argued that Defendant's unwillingness to address previous project failures was unlawful because it ignored the cumulative impacts of those projects and the Dinkey Project together (pages 18-21). Conservation Groups also separately argued that Defendant violated NEPA by failing to respond to relevant public comments regarding the lessons learned from prior project outcomes (pages 5-6). Conservation Groups noted that they "have spent an extensive amount of time in public comments and meetings with the district on the need to weigh the effects of past logging on project design and implementation" and that, despite this, Defendant's NEPA documentation contains "no mention of Hogback, our pictures and discussion, or the [Defendant's] own . . . work" (page 5).

b. With respect to the Dinkey Project's likely costs and benefits, Conservation Groups explained that ecological benefits of the project are speculative (pages 11-15); that the risk to soil and water is high (pages 7-10); and that the likelihood of significant remediation expenses is correspondingly high (pages 15-17). Conservation Groups further argued that the Dinkey Project is fiscally irresponsible and will not further the Forest Service's responsibility to maintain and restore watersheds, especially in light of the "backlog" of work needed to protect soil and water resources (pages 4, 17).

85. Conservation Groups' objection offered suggested remedies to resolve the objection.

a. Conservation Groups asked “that this project not go forward until the concern[s] addressed in this objection are met”—namely, the objection’s concerns about “mitigation, acknowledgment of compelling evidence and science, economic/budgetary issues, overall ecological effects, and the need to avoid decision making that is arbitrary and capricious” (page 23).

b. Throughout their objection, Conservation Groups described the remedies needed in order to address these issues: that the “recognition [of a long history of negative effects] must translate into a greatly altered or withdrawn project” (page 2); that Defendant’s NEPA analysis must “go beyond the ‘mere listing’” of mitigation measures (page 3); that Defendant provide a “forthright analysis that establishes the costs for mitigating this project in the context of past similar projects” (page 4, *see also* 17); that Defendant address public comments relating to the Hogback Project and other timber sales with similar site conditions (pages 5-6); that Defendant’s “experience with Hogback . . . be considered and disclosed under NEPA” (page 9); that Defendant’s NEPA documentation “include[] an analysis of Hogback and explain why and how the Forest Service believes it can achieve a different result at Dinkey, if it believes it can” (page 9); that Defendant should “be more selective about where it attempts shortleaf [pine] restoration” and should not “pick high-risk sites like the Tumbling Creek corridor” as an experiment (page 15); that Defendant’s cumulative effects analysis should “take[] into account . . . the larger scope of the potential for this project to affect an already strained

watershed” (page 21); and that Defendant should be “transparen[t]” and “forthright about its analysis of previous projects” by providing documentation to the public (page 22).

86. Conservation Groups’ objection offered supporting reasons for the Defendant’s reviewing officer to consider.

a. Conservation Groups supported their arguments regarding inadequate mitigation with extensive discussion and supporting reasons, including site characteristics (soil type, steep slopes, concave topography, and proximity to Tumbling Creek), heavy logging methods, and the experience with prior projects (pages 7-9).

b. With respect to the Dinkey Project’s likely costs and benefits, Conservation Groups provided a number of supporting reasons, including the difficulty of regenerating shortleaf pine, the likelihood of erosion problems, and the extraordinary cost (at least \$40,980.22 and as much as \$112,386) of unsuccessful attempts to remediate soil loss from a single unit from the Island Creek (Hogback) Project. Conservation Groups explained that Defendant’s NEPA documentation did not weigh speculative project benefits against “comparable contingency cost estimates based at least on what has been spent at Hogback” (page 16-17).

#### **Defendant’s “Set Aside” of Conservation Groups’ Objection**

87. By letter dated August 25, 2017, Cherokee National Forest Service Supervisor D. JaSal Morris “set aside” Conservation Groups’ objection, finding that “[t]he objection does not provide sufficient information as requested by 218.8(d)(5) and (6) for the reviewing officer to review.”

88. Supervisor Morris’s August 25, 2017 letter applies 36 C.F.R. §§ 218.8(d)(5) & (6) as follows:

Based on the information provided in your objection, the issues raised do not demonstrate connection to prior comments with specific violations of law, regulation, or policy. In addition, no specific proposed remedies are stated for consideration by the Reviewing Officer for resolving the objection. Therefore, the objection does not comply with 36 CFR 218.8(d)(5) and (6).

89. Supervisor Morris's August 25, 2017 letter concludes by stating that it "constitutes the final administrative determination of the Department of Agriculture, no further administrative review from any other Forest Service or U.S. Department of Agriculture official of my written response is available (36 CFR 218.10). Implementation of the project may occur immediately following the decision by the District Ranger."

90. Surprised by this dismissal, Conservation Groups, who had previously been participating without representation, retained counsel.

91. On January 4, 2018, Conservation Groups' counsel sent a letter to Supervisor Morris explaining that Conservation Groups' objection complied with all applicable requirements; that Defendant's decision was unlawful; and that, among other remedies, Defendant should re-issue the draft decision in order to initiate a new objection period and consider Conservation Groups' objection on its merits.

92. On January 29, 2018, Supervisor Morris replied to Conservation Groups' January 4, 2018 letter and reaffirmed the agency's prior decision, finding again that "[t]he objection does not provide sufficient information as requested by 218.8(d)(5) and (6) for the reviewing officer to review." Defendant's January 29, 2018 letter is attached as Attachment 1.

93. Defendant's January 29, 2018 letter further states that Conservation Groups "did not demonstrate the connection between prior specific written comments and the objection, including respective proposed [sic] violation of law, regulation, policy, suggested remedies and supporting reason [sic] for the reviewing officer to consider."

94. On January 30, 2018, Defendant posted a Final DN and FONSI (signed December 7, 2017) to its website, attached as Attachment 2. The Final DN and FONSI were unchanged in relevant part from the earlier Draft DN and FONSI.

### Claims for Relief

#### **Count 1: Defendant’s Dismissal of Conservation Groups’ Objection Is Contrary to the Plain Language of the Predecisional Objection Regulations**

95. Conservation Groups incorporate and restate by reference the allegations of paragraphs 1 through 94 of this Complaint as if fully set forth in full.

96. Defendant’s application of the predecisional objection regulations (finding that “the issues raised do not demonstrate connection to prior comments with specific violations of law, regulation, or policy”) is contrary to the plain language of the regulations. The regulations do not require objectors to demonstrate a connection to prior comments *with* specific violations of law, regulation or policy. Instead, they require that objectors include “[a] statement that demonstrates the connection between prior specific written comments . . . and the content of the objection,” 36 C.F.R. § 218.8(d)(6), and, separately and only “if applicable,” to include “how the objector believes the environmental analysis or draft decision specifically violates law, regulation, or policy,” 36 C.F.R. § 218.8(d)(5). Defendant’s application of the regulations combines two independent requirements and makes mandatory a type of information that is optional under the regulations’ plain language and Defendant’s own explanation of the regulations. *See* 78 Fed. Reg. 18488 (“the phrase ‘if applicable’ renders this content element as optional”).

97. Some of the issues raised in Conservation Groups’ objection were accompanied by arguments that the decision violates law, regulation, or policy. Some of the issues raised in Conservation Groups’ objection were accompanied by arguments that the decision was

imprudent or unwise. Defendant is obligated equally to respond to both types of issues on their merits.

98. Defendant's interpretation and application of the regulations is contrary to law and is subject to de novo review and reversal pursuant to 5 U.S.C. § 706.

**Count 2: Defendant Erred in Finding that Conservation Groups  
Did Not Demonstrate a Connection to Prior Comments**

99. Conservation Groups incorporate and restate by reference the allegations of paragraphs 1 through 94 of this Complaint as if fully set forth in full.

100. Defendant's dismissal of Conservation Groups' objection states that "the issues raised do not demonstrate connection to prior comments with specific violations of law, regulation, or policy."

101. Conservation Groups' objection included "[a] statement that demonstrates the connection between prior specific written comments on the particular proposed project or activity and the content of the objection," as required by Forest Service regulations, to wit: "Our objections . . . restate concerns that we have made throughout the process for this project. Our concerns have been communicated in comments on the scoping phase, a series of questions directed to agency personnel via phone and email, comments made after the publication of the Environmental Analysis (EA), as well as February 2017 and July 2017 meetings with Cherokee rangers."

102. Defendant's dismissal of Conservation Groups' objection, to the extent that it is based on a finding that Conservation Groups did not demonstrate a connection to prior comments, is arbitrary, capricious, contrary to law, and fails to observe procedures required by law. It is therefore subject to reversal pursuant to 5 U.S.C. § 706.

**Count 3: Defendant Erred in Finding that Conservation Groups Did Not Propose Remedies for the Reviewing Officer's Consideration**

103. Conservation Groups incorporate and restate by reference the allegations of paragraphs 1 through 94 of this Complaint as if set forth in full.

104. Defendant's dismissal of Conservation Groups' objection states that "no proposed remedies are stated for consideration by the Reviewing Officer for resolving the objection."

105. Conservation Groups' objection proposes at least 10 remedies, both general and specific, for the Defendant's consideration.

106. Defendant's dismissal of Conservation Groups' objection based on a finding that the objection did not propose remedies for consideration is arbitrary, capricious, contrary to law, and fails to observe procedures required by law. It is therefore subject to reversal pursuant to 5 U.S.C. § 706.

**Count 4: Defendant's Approval of the Dinkey Project Violated the National Forest Management Act**

107. Conservation Groups incorporate and restate by reference the allegations of paragraphs 1 through 94 of this Complaint as if set forth in full.

108. Under NFMA, the Forest Plan must ensure that timber will be harvested only where soil, slope, and other watershed conditions will not be irreversibly damaged.

109. To ensure irreversible damage does not occur, Defendant adopted a measurable threshold, concluding that soil impairment has not occurred so long as less than 15% of the activity area is disturbed.

110. Defendant's decision for this project leaves no margin of error, estimating that approximately 15% of the activity areas will be disturbed, even if no surfaces other than skid trails, roads, and log landings are disturbed.

111. In the recent nearby Island Creek (Hogback) timber sale, with similar soils, slopes, and harvest methods, Defendant's own monitoring data shows that over one third of soil disturbance occurred in the interior of stands, not only on skid trails, roads, and log landings, and that actual disturbance exceeded both the Defendant's prediction (10%) and the 15% threshold for impairment.

112. Defendant's own monitoring data and findings noted a need for additional limitations or mitigation in future projects, but Defendant nevertheless failed to consider the relevance of the monitoring report to the Dinkey Project.

113. Defendant was aware that erosion problems occurred on previous projects because of high skid trail density and location of skid trails on steep slopes, and which could have been avoided by limiting skid trail density, lighter harvest methods, or avoiding the need for skid trails on steep slopes by using skyline harvest instead of ground-based logging or by only harvesting as far down from the ridgetop as feasible to retrieve trees by cable winching. The Dinkey Project decision did not include any of these mitigation measures.

114. Without the mitigation measures identified in Paragraph 113 or comparable mitigation measures, the Dinkey Project is virtually certain to exceed the 15% threshold for soil impairment, and is therefore inconsistent with the Forest Plan's requirement to leave at least 85% of a project area undisturbed and to "[d]esign and implement projects in ways that will maintain or improve the long-term productive capacity of the soil resource."

115. Defendant's decision approving the Dinkey Project is accordingly arbitrary, capricious, and contrary to law, and subject to reversal pursuant to 5 U.S.C. § 706.

**Count 5: Defendant Violated NEPA By Failing To Disclose A High Risk of Erosion**

116. Conservation Groups incorporate and restate by reference the allegations of paragraphs 1 through 94 of this Complaint as if set forth in full.

117. An Environmental Assessment must disclose and assess “the environmental impacts of the proposed action and alternatives.” 40 C.F.R. § 1508.9(b). In order to determine whether an Environmental Impact Statement is required, the EA must disclose and assess the degree of risk that harm will occur. 40 C.F.R. § 1508.27(b)(5). Impacts caused by previous similar actions are relevant to the assessment of risk.

118. Defendant’s EA fails to disclose and assess the risk of erosion for the Dinkey Project in light of the recent nearby failures in the Island Creek and Hopper Branch timber sales. Defendant acknowledged in its monitoring report conclusions and in other communications that the outcomes of nearby timber sales are relevant to the risk of erosion and needed design and mitigation changes for future projects, yet failed to disclose these outcomes to the public or provide a reasoned decision that similar outcomes could be avoided in the Dinkey Project.

119. Defendant failed to consider an important aspect of the Dinkey Project by turning a blind eye to its own reports showing impermissible erosion caused by nearby, recent, and similar timber sales.

120. Defendant’s decision is therefore arbitrary, capricious, contrary to law, and fails to observe the procedures required by law and is subject to reversal pursuant to 5 U.S.C. § 706.

**Count 6: Defendant Failed to Comply with NEPA Because the Dinkey Project Cannot Proceed Without an Environmental Impact Statement**

121. Conservation Groups incorporate and restate by reference the allegations of paragraphs 1 through 94 of this Complaint as if set forth in full.

122. Agency actions require an EIS if they may have significant impacts on the environment. 42 U.S.C. §4332.

123. The Dinkey Project's impacts are significant because they threaten a violation of NFMA, a statute imposed to protect the environment and public lands. 40 C.F.R. § 1508.27(b)(10).

124. The Dinkey Project's impacts are significant because they threaten unique characteristics of the Tumbling Creek drainage in the upper Ocoee watershed—*i.e.*, they would cause the degradation of soil resources in a healthy stream in a watershed with heavy historical impacts to soil and water. 40 C.F.R. § 1508.27(b)(3).

125. The Dinkey Project's impacts are significant because they are cumulative with the impacts of other projects, like the Island Creek and Hopper Branch timber sales, which have not previously been disclosed or analyzed in the Forest Plan EIS or in other project-level analyses. 40 C.F.R. § 1508.27(b)(7).

126. The Dinkey Project's impacts are significant because the decision would set a precedent for future projects. 40 C.F.R. § 1508.27(b)(6). Defendant should learn from its recent mistakes and develop better mitigation practices for all future projects with similar risks. If appropriate analysis and mitigation is not required for this project, then it is unlikely to be provided for future projects.

127. The Dinkey Project's impacts are significant because they involve risks that remain highly uncertain due to Defendant's failure to disclose, assess, and mitigate them. 40 C.F.R. § 1508.27(b)(5).

128. Defendant's failure to prepare an EIS is arbitrary, capricious, contrary to law, and fails to observe procedures required by law. It is therefore subject to reversal pursuant to 5 U.S.C. § 706.

**Count 7: Defendant Failed to Comply with NEPA Because  
Defendant's Mitigation is Inadequate to Support a FONSI**

129. Conservation Groups incorporate and restate by reference the allegations of paragraphs 1 through 94 of this Complaint as if set forth in full.

130. In order to rely on mitigation measures to support a FONSI, an agency must connect the dots between the potential adverse impacts and the associated mitigated measures intended to avoid them.

131. Given the significant erosion caused by its recent nearby timber sales, Defendant has not offered a rational connection between the facts of the Dinkey Project as described in the Decision Notice and the judgment that no significant impacts will result.

132. Defendant's Decision Notice and Finding of No Significant Impact is therefore arbitrary, capricious, contrary to law, and fails to observe procedures required by law, and it is subject to reversal pursuant to 5 U.S.C. § 706.

**Count 8: Defendant Unlawfully Failed to Respond to Public Comment**

133. Conservation Groups incorporate and restate by reference the allegations of paragraphs 1 through 94 of this Complaint as if set forth in full.

134. For any proposal requiring NEPA analysis, the Forest Service must consider and respond to public comments in the administrative record. 36 C.F.R. § 220.4(c).

135. Defendant did not consider or respond to Conservation Groups' comments related to the Hogback Project and its relevance to the Dinkey Project, but instead deliberately ignored those comments.

136. Defendant's failure to address relevant public comments on the Dinkey Project is arbitrary, capricious, contrary to law, and fails to observe procedures required by law, and it is therefore subject to reversal pursuant to 5 U.S.C. § 706.

**Request for Relief**

WHEREFORE, Conservation Groups respectfully request that this Court enter a judgment in favor of Conservation Groups and against Defendant and enter an Order:

- A. Declaring that Defendant's dismissal of Conservation Groups' objection was in violation of Forest Service regulations;
- B. Declaring that Defendant's approval of the Dinkey Project violated the National Environmental Policy Act and the National Forest Management Act;
- C. Reversing both Defendant's dismissal of Conservation Groups' objection and Defendant's approval of the Dinkey Project;
- D. Enjoining Defendant from marking trees for bid and sale, accepting bids from timber purchasers, entering into contracts for the purchase and sale of timber, performing road maintenance or construction contemplated in the Dinkey Project decision, or otherwise taking any action to implement the Dinkey Project, unless and until Defendant complies with all requirements of law;
- E. Allowing Conservation Groups to recover their costs, including reasonable attorneys' fees, incurred in connection with this action, 28 U.S.C. § 2412(d);
- F. Granting any further relief as the Court considers just in order to protect the interests of Conservation Groups, to remedy the violations of law alleged in this Complaint, and to protect public lands and the public interest.

This 15<sup>th</sup> day of March 2018.

s/ Anne Passino

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