Rachel M. Fazio (CA Bar No. 187580)
P.O. Box 897
Big Bear City, CA 92314
(530) 273-9290
rachelmfazio@gmail.com

Justin Augustine (CA Bar No. 235561)
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA 94104
(415) 436-9682
Fax: (415) 436-9683
jaugustine@biologicaldiversity.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

EARTH ISLAND INSTITUTE and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

DEAN GOULD, in his official capacity as Forest Supervisor for the Sierra National Forest, and UNITED STATES FOREST SERVICE, an agency of the Department of Agriculture,

Defendants.

Case No. 1:14-CV-01140 KJM-SKO

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Until the late 1980s, old-growth forests were pejoratively described as "decadent" and "over-mature", and U.S. Forest Service policy was to clearcut these forests to replace them with tree plantations, which were seen as more productive and beneficial. Old-growth forests, prior to that time, were generally viewed as having relatively little value, other than for lumber. By the early 1990s, however, the ecological science had caught up with the Forest Service and it became widely known that old-growth forests are highly biodiverse, with many rare and threatened wildlife species associated with and dependent upon such forests. In the 1990s, the Spotted Owl became a household name, and a new understanding of old-growth forests emerged—one that viewed this habitat as ecologically valuable, and precious. The same transition is occurring right now with regard to "complex early seral" forest—areas of mature conifer forest that experience patches of moderate to high-intensity fire, wherein most or all trees are killed. While the Forest Service continues to portray such areas as destroyed by, or lost to, fire, in order to justify post-fire logging (the Forest Service keeps 100% of the revenue from post-fire logging, creating a powerful perverse financial incentive), there now exists an abundance of ecological science, including the agency's own, directly contradicting the Forest Service on this point. This science shows that the Forest Service's positions and assumptions are outdated and fundamentally flawed. Just as the science caught up with the Forest Service on old-growth forests, it has now caught up with the agency with regard to post-fire habitat, and we now know that these forests affected by fire—especially the patches that burn hottest and create the most "snags" (fire-killed trees that remain standing)—are ecological treasures. As an October 30, 2013, letter to Congress from about 250 scientists from across the nation explains: "This post-fire habitat, known as 'complex early seral forest,' is quite simply some of the best wildlife habitat in forests and is an essential stage of natural forest processes. Moreover, it is the least protected of all forest habitat types and is often as rare, or rarer, than old-growth forest, due to damaging forest practices encouraged by post-fire logging policies . . . ." Yet, when this extensive body of knowledge was presented to the Forest Service during comments on the challenged post-fire logging project at issue in this case (the Aspen Project on the Sierra National Forest), the agency looked to the past, relying upon its decade-old forest plan (the 2004

Sierra Nevada Forest Plan Amendment). For example, when presented by Plaintiffs with new scientific information showing that complex early seral forest created by high-intensity fire is suitable foraging habitat for California Spotted Owls, *that the owls preferentially select this habitat*, and that post-fire logging is associated with loss of occupancy within Spotted Owl territories, the Forest Service parenthetically acknowledged that the current science finds that moderate- and high-intensity fire areas are suitable Spotted Owl foraging habitat, while inexplicably concluding, in the same sentence, that "the proposed project would not result in *any* additional reduction of spotted owl habitat beyond what was caused by the Aspen Fire", putting on its blinders and referencing the outdated 2004 forest plan (cited as "SNFPA (2004)"), which assumes that such areas are non-habitat for Spotted Owls, and that impacts to Spotted Owls from post-fire logging in such habitat can be ignored on this basis (Aspen Response to Comments, p. 142).

2. Through this action, Plaintiffs Earth Island Institute and Center for Biological Diversity challenge the "Aspen Recovery and Reforestation Project" ("Aspen Project") within the 2013 Aspen Fire in the Sierra National Forest, administered by the U.S. Forest Service. According to the EA and DN for the Aspen Project, the Forest Service proposes to conduct post-fire "salvage" logging, removing approximately 1,835 acres, mostly in complex early seral forest habitat on national forest lands in a remote area approximately 22-25 miles east of Oakhurst, California, plus an additional 3,239 acres of post-fire logging in currently lower-intensity areas that the Forest Service predicts will have higher proportions of tree mortality by 2015 and beyond, and 1,125 acres of roadside logging (Aspen EA, p. 15). Both Projects would also involve the eradication of much of the native post-fire shrub habitat through mechanical and other means, such as intensive herbicide use.

3. "Complex early seral forest", also known as snag forest habitat, is one of the rarest and least protected of all forest habitat types in the Sierra Nevada. Due to fire suppression policies, it is estimated there is now about one-fourth as much higher-intensity fire—the type of fire that creates complex early seral forest—as there was prior to the early 20th century (Hanson and Odion 2014, Odion et al. 2014), and even the Forest Service's scientists admit that less of this habitat is created by fire each year currently, as compared to amounts prior to fire suppression policies (Mallek et al. 2013) (Table 3,

showing that the annual area of high-severity [AAHS] for the forest types that dominate the Aspen project area—dry mixed-conifer [DMC], moist mixed-conifer [MMC], and yellow pine [YP] is 6,473 hectares [15,988 acres] in the Sierra Nevada, while it was 8,910 hectares [22,008 acres] historically). This deficit is further exacerbated by losses due to post-fire logging of snags (standing fire killed trees) and eradication of native fire-following shrubs. This habitat—if not subjected to post-fire logging—supports levels of native biodiversity and wildlife abundance comparable to, and even higher than, that of unburned mature/old forest (Raphael et al. 1987, Burnett et al. 2010, Swanson et al. 2011). In complex early seral forest, native wood-boring beetles lay their eggs on snags, and their larvae, after boring into the snag, become the primary food source for Black-backed Woodpeckers and other woodpecker species (Hanson and North 2008, Siegel et al. 2013). In fact, each adult Black-backed Woodpecker consumes over 13,500 wood-boring beetle larvae each year. The Black-backed Woodpecker is a monogamous species that is the strongest cavity excavator in North America. Anatomically distinct, they have only three toes, instead of four, so that their strike on a recently killed tree has more force (allowing them to prey upon beetle larvae that other woodpeckers have difficulty reaching). Their tongues are extremely long and attached to the back of their skull so that it can forcefully penetrate deep within the wood of the tree to extract the larvae, and they have fluid sacks behind their eyes to protect their brains from damage from their hard strikes (Dixon and Saab 2000). Black-backed Woodpeckers create a new nest cavity every year (even when they stay in the same territory), allowing the cavity from the previous year to be used by the many cavity-nesting species that cannot create their own nest holes, like bluebirds, nuthatches, chickadees, and even flying squirrels (Tarbill 2010). Native flowering shrub patches in complex early seral forest attract native flying insects, which provide food for flycatching birds and rare and sensitive bat species (Swanson et al. 2011, Buchalski et al. 2013), and these shrub patches are excellent habitat for small mammals which, in turn, provides food for raptors like the California Spotted Owl, which preferentially selects such areas to find its prey (Bond et al. 2009, Bond et al. 2013). This is a rich and vibrant ecosystem, if left unlogged.

4. This action arises under, and alleges violations of, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*; the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq.*; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*; and the statutes' implementing regulations. Specifically, this action challenges the Environmental Assessment, and Decision Notice and Finding of No Significant Impact ("FONSI"), issued by Dean Gould, Forest Supervisor for the Sierra National Forest, and the United States Forest Service (referred to collectively as "Defendants" or "Forest Service"). Plaintiffs may seek temporary, preliminary, or permanent injunctions against all or portions of the federally approved activities challenged herein to forestall irreparable injury to the environment and to Plaintiffs' interests, and any other such relief as the Court deems appropriate.

JURISDICTION

5. Jurisdiction over this action is conferred by 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief). This cause of action arises under the laws of the United States, including NEPA, NFMA, the APA, and implementing regulations established pursuant to these federal statutes. An actual, justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 705 and 706.

VENUE

6. Venue in this Court is proper under 28 U.S.C §§ 1391 and 1392. The challenged action is located in the Eastern District; thus venue therefore properly vests in this district.

PARTIES

7. Plaintiff Earth Island Institute ("EII") is a nonprofit corporation organized under the laws of the state of California. EII is headquartered in Berkeley, California. EII's mission is to develop and support projects that counteract threats to the biological and cultural diversity that sustains the environment. Through education and activism, these projects promote the conservation, preservation and restoration of the Earth. One of these projects is the John Muir Project—whose mission is to protect all federal public forestlands from commercial exploitation that undermines and compromises science-based ecological management. John Muir Project offices are in San Bernardino County,

California. EII is a membership organization with over 15,000 members in the U.S., over 3,000 of whom use and enjoy the National Forests of California for recreational, educational, aesthetic, spiritual, and other purposes. EII, through its John Muir Project, has recently appealed numerous timber sales on National forests in the Sierra Nevada, including the Projects at issue in this case which, if implemented, would adversely affect the interests of their members. EII through its John Muir Project has a longstanding interest in protection of national forests. EII's John Muir Project and EII members actively participate in governmental decision-making processes with respect to national forest lands in California and rely on information provided through the NEPA processes to increase the effectiveness of their participation.

8. Earth Island Institute's members include individuals who regularly use public lands within the Sierra National Forest, and the Aspen fire area in particular, for scientific study, recreational enjoyment, aesthetic beauty, and nature photography. These members' interests will be irreparably harmed by the planned logging in the Aspen fire area, as they will no longer be able to scientifically study this area in it natural (pre-logging) state, take nature photographs of the area in its natural (pre-logging) state, or enjoy the aesthetic beauty of the unlogged snag forest habitat and its inhabitants in their natural state.

9. Plaintiff Center for Biological Diversity ("the Center") is a non-profit corporation with offices in San Francisco, Los Angeles, and Joshua Tree, California; Nevada; Oregon; Washington; Arizona; New Mexico; Alaska; and Washington, D.C. The Center is actively involved in species and habitat protection issues throughout North America and has more than 42,000 members, including many members who reside and recreate in California. One of the Center's primary missions is to protect and restore habitat and populations of imperiled species, including from the impacts of logging and climate change.

10. The Center's members and staff include individuals who regularly use and intend to continue to use the Sierra National Forest, including the lands that were affected by the Aspen fire and are now planned for logging as part of this Project. These members and staff use the area for observation, research, aesthetic enjoyment, and other recreational, scientific, spiritual, and educational

activities. Many of the Center's staff and members use the area to observe and study imperiled species like the Black-backed Woodpecker, California Spotted Owl, and Pacific Fisher that, since the Aspen fire burned, can be found in project area. These members' interests will be irreparably harmed by the planned logging in the fire area, as they will no longer be able to visit and enjoy this area in its unlogged state, nor will they be able to observe or attempt to observe the Black-backed Woodpecker, California Spotted Owl, Pacific Fisher, or other species which use and are dependent on these areas in their unlogged state.

11. This suit is brought by EII and the Center on behalf of themselves and their adversely affected members and staff. Plaintiffs and their members' present and future interests in and use of the Project area are and will be directly and adversely affected by the challenged decision. Those adverse effects include, but are not limited to: (1) impacts to native plants and wildlife and their habitats within and around the Project area from logging, biomass removal, soil compaction, noise, and human presence; (2) impacts to riparian areas and water quality; (3) reduction and impairment of recreation opportunities; (4) impaired aesthetic value of forest lands, trails, and landscapes caused by Defendants' logging; and (5) loss of scientific study opportunities with regard to Black-backed Woodpecker, California Spotted Owl, and Pacific Fisher use of unlogged post-fire habitat, and loss of scientific study opportunity with regard to natural post-fire conifer regeneration in areas proposed for logging. In addition, Plaintiffs and their members and staff have an interest in ensuring that Defendants comply with all applicable laws, regulations, and procedures pertaining to the management of national forest lands.

12. Because Defendants' actions approving the Project violate several procedural and substantive laws, a favorable decision by this Court will redress the actual and imminent injury to Plaintiffs.

13. Both Plaintiffs participated in the administrative process culminating in the issuance of Project Decision Notice and FONSI by submitting comments on the Preliminary Environmental Assessment ("EA") for the Project. Defendants requested and received (from the Washington, D.C. office of the Forest Service) an economic "emergency situation determination" (ESD) for the Project,

which allows the agency to begin logging after the decision is signed, without any further public input or process, such as an administrative appeal or objection. As such, Plaintiffs have exhausted all available administrative remedies.

14. Defendant Dean Gould is the Forest Supervisor for the Sierra National Forest and is being sued in his official capacity. Mr. Gould is directly responsible for forest management on the Sierra National Forest and for ensuring that all resource management decisions comply with applicable laws and regulations. Mr. Gould signed the Decision Notice for the Aspen Project challenged here. Mr. Gould officially resides in Clovis area of California.

15. Defendant United States Forest Service is an agency of the United States Department of Agriculture. The Forest Service is responsible for the administration and management of the federal lands subject to this action, including the implementation of NEPA, NFMA, the APA, and the statutes' implementing regulations.

LEGAL BACKGROUND

A. The National Environmental Policy Act

16. The National Environmental Policy Act ("NEPA") is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA's twin aims are to ensure that federal agencies consider the environmental impacts of their proposed actions and to ensure that agencies inform the public that environmental concerns have been considered.

17. NEPA requires "responsible [federal] officials" to prepare an environmental impact statement ("EIS") to consider the effects of each "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i). Preparation of an EIS is mandated if "substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor." *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1219-20 (9th Cir. 2008) (emphasis added). To determine whether the impacts of a proposed action are significant enough to warrant preparation of an EIS, the agency may first prepare an environmental assessment ("EA"). An agency must prepare an EIS for any action that

has "individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). A cumulative impact is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* § 1508.7.

18. The EA must take a "hard look" at the impacts, and must not minimize adverse side effects of the proposed action; if the agency decides the impacts are not significant, it must supply a convincing statement of reasons why. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998); *Ocean Advocates v. United States Army Corps of Engineers*, 361 F.3d 846, 865 (9th Cir. 2003); *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147 (9th Cir. 2006). Further, if significant new information or changed circumstances arise, the Forest Service must prepare a supplemental EA or EIS. 40 C.F.R. § 1502.9(c); *Price Road Neighborhood Ass'n, Inc. v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1508-1509 (9th Cir. 1997). In the analysis of impacts, there must be a rational connection between the facts found and the decision made. *Ocean Advocates v. United States Army Corps of Engineers*, 361 F.3d 846, 865 (9th Cir. 2003); *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147 (9th Cir. 2006).

19. Further, NEPA's implementing regulations require that the agency "shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions," and shall ensure the scientific accuracy and integrity of environmental analysis. *Id.* § 1502.24. The agency must disclose if information is incomplete or unavailable and explain "the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts." *Id.* § 1502.22(b)(1). The agency must also directly and explicitly respond to dissenting scientific opinion. *Id.* § 1502.9(b). Agencies must fully analyze a reasonable range of alternatives and the purpose and need for projects cannot be arbitrarily narrow. *Id.* § 1502.13, 1502.14.

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B. The National Forest Management Act

20. The National Forest Management Act ("NFMA") establishes the statutory framework for management of the National Forest System. NFMA requires the Forest Service to develop a Land and Resource Management Plan ("Forest Plan") for each national forest.

21. Pursuant to NFMA, all site-specific actions taken within a national forest must be consistent with the applicable forest plan. *Id.* § 1604(i).

22. In 1982, the Forest Service promulgated regulations implementing NFMA.

23. In 2000, the NFMA regulations were replaced with interim regulations, which state that previous requirements of the 1982 regulations, including the wildlife viability requirement, remain as enforceable requirements so long as they are incorporated into the forest plan at issue.

24. In 2012, new NFMA regulations were issued. However, the transition provision which requires the Forest Service to "consider" the "best available science" in environmental analysis documents for site-specific projects remains in effect until the Forest Plans at issue have been revised. 36 C.F.R. § 219.35(a); *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658-660 (9th Cir. 2009) (Forest Service violates the best available science requirement in site-specific project documents when the science submitted by Plaintiffs demonstrates that the agency's positions/studies are outdated or flawed, or where the studies submitted by Plaintiffs directly undermine the Forest Service's conclusions, and the agency has not "carefully considered" the evidence from Plaintiffs).

FACTUAL BACKGROUND

25. The Aspen fire occurred in July of 2013, covering about 22,350 acres on the Sierra National Forest in a remote area about 8 miles west of Huntington Lake. The fire had a mosaic of effects, with 80% of it comprised of low and moderate-intensity fire effects (Aspen EA, pp. 6-8).

26. The Sierra National Forest operates under the 1992 Land and Resources Management Plan as amended by the 2004 Framework Amendment and the 2007 MIS Amendment. This Plan has not yet been revised under the 2012 NFMA Planning Rule.

27. In November of 2013, the Sierra National Forest issued a scoping notice inviting public comments on their proposal to conduct a post-fire logging project in the Aspen fire (Aspen Project), and Plaintiffs submitted scoping comments in December of 2013.

28. In April of 2014, the Sierra National Forest issued a Preliminary Environmental Assessment for the Aspen Project. Plaintiffs submitted detailed expert comments, and scientific sources, during the comment period on the EA.

29. The EA for the Aspen Project states that the generation of revenue for the Forest Service's budget from the sale of timber from the Project area to private logging companies (since the agency keeps the receipts from the sale of post-fire timber) is a primary purpose and need of the Project (Aspen EA, p. 10). The Forest Service granted itself an economic "Emergency Situation Determination" (ESD) to facilitate more rapid logging.

30. Post-fire forest provides essential habitat for many fire-dependent species, including the rare Black-backed Woodpecker. This species depends upon recent moderately to severely burned forest habitat, which creates a very high density of large "snags" or dead trees, for nesting and foraging (generally at least 80 to 100 medium and large snags per acre across at least 100 to 300 acres per pair, within post-fire habitat that is typically less than 8 to 10 years old).

31. In 2012 the Forest Service commissioned the preparation of a Conservation Strategy for the Black-backed Woodpecker that would advise the Forest Service on what management activities in burned forest would be compatible with the continued existence of this species. The Conservation Strategy recommends, in part, as follows:

- "patches retained to support Black-backed Woodpeckers should incorporate areas with the highest densities of the largest snags to provide foraging opportunities (see Siegel et al. 2012b) as well as high density patches of medium- and small-diameter snags (see Seavy et al. in press) in the interior of the fire area to support higher nesting success in the early postfire years (see Saab et al. 2011)";
- "focus on retaining large patches of predominately prey-rich trees as evidenced by wood-boring beetle holes on trunks, or by using another appropriate index";

- "post-fire clear-cut patches (where all the snags in an area are removed) should not exceed 2.5 ha [6.18 acres](see Schwab et al. 2006)";
- "Avoid harvesting fire-killed forest stands during the nesting season (generally May 1 through July 31). This management recommendation will protect dozens of other nesting bird species associated with burned forests in addition to the Black-backed Woodpecker."

32. Blacked-backed Woodpeckers are currently residing in the Aspen project area.

33. The Aspen Project would eliminate about 38% of the estimated Black-backed Woodpecker pairs (6.5 out of 17.1 projected pairs would be lost), and would remove about 41% of the suitable Black-backed Woodpecker habitat (Aspen EA, p. 202).

34. The proportion of suitable Black-backed Woodpecker habitat that would be removed by the Aspen Project is more than twice as high as the proportion (21%) removed on Forest Service lands over the past several years. Aspen EA, p. 204.

35. In addition to eliminating thousands of acres of suitable and occupied Black-backed Woodpecker habitat in the Project area**,** logging of suitable Black-backed Woodpecker habitat would occur in the nesting season in 2015. Such action can potentially kill black-backed woodpecker chicks in the nest before they can fly away, increases the chance of nest abandonment, inhibits population growth of this species, and is contrary to the recommendations of the Forest Service's own Conservation Strategy for the Black-backed Woodpecker (Bond et al. 2012).

36. Monica Bond, the lead author of the Forest Service's Conservation Strategy for the Black-backed Woodpecker, criticized the Forest Service for permitting the logging of post-fire habitat during Black-backed Woodpecker nesting season.

37. In responding to Monica Bond's comments, the Aspen EA did not analyze the impacts to the Black-backed Woodpecker from logging during nesting season.

38. The Aspen Project Response to Comments (p. 139), acknowledged that the Forest Service's Black-backed Woodpecker Conservation Strategy recommended, based upon the best available science, avoiding all logging in suitable Black-backed habitat during nesting season, and

acknowledged that nesting season extends through July 31st, and that 43% of suitable Black-backed habitat would be logged, but then inexplicably concluded: "Based upon the lack of effects to black-backed woodpecker habitat and nesting birds an additional alternative that limited harvests for black-backed woodpecker habitat [to avoid nesting season] was considered unnecessary".

39. The Black-backed Woodpecker subspecies occurring in the Sierra Nevada forests has been petitioned for listing under the Endangered Species Act (ESA), and the U.S. Fish and Wildlife Service (USFWS), on April 9, 2013, issued a determination that substantial scientific evidence had been presented in the Petition sufficient to conclude that listing this species under the ESA "may be warranted", due to threats such as a deficit of habitat due to fire suppression and post-fire logging (USFWS 2013).

40. On national forest lands, the Black-backed Woodpecker is the sole management indicator species (MIS), or bellwether, for all wildlife species positively associated with high levels of snags (standing fire-killed trees) in post-fire habitat.

41. The Aspen EA did not discuss the fact that the USFWS has determined that the Sierra Nevada and eastern Oregon Cascades population of the Black-backed Woodpecker may need to be listed under the ESA due in large part to post-fire logging, exacerbated by an overall scarcity of suitable habitat, relative to historical (before the early 1900s) conditions, due to fire suppression policies.

42. Current science also concludes that post-fire logging of one-third of suitable Black-backed Woodpecker habitat will lead to a precipitous decline in populations and a trend toward extinction over the next three decades (Odion and Hanson 2013).

43. The Aspen EA does not provide any explanation as to how the removal of well over one-third of the suitable Black-backed Woodpecker habitat created by the Aspen fire does not represent a serious threat to Black-backed Woodpecker populations.

44. In addition, the cumulative effects from the high proportion of removal of suitable Black-backed Woodpecker habitat that would be destroyed by the Aspen Project (41%), particularly in

combination with other reasonably foreseeable losses of habitat, such as in the Rim fire area, were also not analyzed, or adequately analyzed, in the EA.

45. The Aspen EA thus failed to adequately address the direct impacts or cumulative effects of their actions on the Black-backed Woodpecker, did not consider or adequately consider all relevant factors or issue a convincing statement of reasons for the decision not to prepare an EIS, and failed to adequately assess intensity factors in determining whether potentially significant adverse impacts would occur from the Projects.

46. The California Spotted Owl is a rare raptor that the Forest Service has designated as a Sensitive Species, meaning that the agency recognizes that there is reason for concern about the population viability of this species. The Forest Service is required to maintain viable populations of Sensitive Species, including the California Spotted Owl.

47. Long known for their association with dense, mature/old forest, spotted owls have, over the past six years, been extensively studied in regard to burned forests. This recent research has found that past assumptions about the relationship between owls and fire are not true. Not only are owls using intensely burned forest, the most recent scientific evidence establishes that California Spotted Owls *preferentially* select unlogged high-intensity fire areas in mature conifer forest for foraging (Bond et al. 2009, Bond et al. 2013).

48. The scientific research has also found that recent fires in the Sierras have not reduced California spotted owl occupancy, and, in fact, spotted owl reproduction is higher in fire areas.

49. However, when post-fire logging of moderate/high-intensity fire areas occurs near or adjacent to territory cores (such as PACs), multiple data sources indicate that occupancy is reduced (Bond et al. 2009, Bond 2011, Lee et al. 2012).

50. Despite this, and more, new science as to the relationship between owls and fire, the Forest Service, in the Aspen EA and Response to Comments, refers back to the 2004 Sierra Nevada Framework to assert that burned forest can be ignored as owl habitat and impacts of post-fire logging on the owls can likewise be ignored.

51. In the Aspen Project, the Forest Service re-mapped four Spotted Owl PACs and HRCAs on the same basis, excluding areas of moderate/high-intensity fire and thus opening these areas to post-fire logging while claiming no impacts to California Spotted Owls (Aspen EA, pp. 179-180).

52. The Aspen EA included a cursory admission that moderate/high-intensity fire areas create suitable Spotted Owl foraging habitat (EA, p. 181), then failed to incorporate, in the impacts analysis, the loss of suitable foraging habitat from post-fire logging in moderate/high-intensity fire areas (Aspen EA, pp. 179-180).

53. In the assessment of adverse impacts to Spotted Owls, the Aspen Project flatly refused to consider the new science that directly undermines the Forest Service's assumptions, and which directly contradicts the agency's outdated studies (none of which actually investigated the relationship between Spotted Owls and fire), regarding California Spotted Owls, stating: "Implementation of action alternatives would not result in *any* additional reduction of habitat beyond what was caused by the Aspen Fires", citing the 2004 Framework (Aspen Project Response to Comments, pp. 47, 142 [emphasis added]).

54. When Plaintiffs submitted new scientific information showing that the 2004 Framework's assumptions about suitable habitat are incorrect and outdated, the Forest Service simply referred back to the 2004 Framework's definition of habitat suitability (Aspen Project Response to Comments, pp. 171, 194). The Aspen Project Response to Comments (pp. 47-49, 60) quoted comments regarding studies finding California Spotted Owls succeeding in unlogged mixed-severity fire areas (Bond et al. 2013), and serious adverse effects to Spotted Owls from post-fire logging (Lee et al. 2012, Clark et al. 2013), but offered no response to these studies. Likewise, the EA offers no response to Bond et al. 2009's recommendation that "burned forests within 1.5 km of nests or roosts of California spotted owls *not be salvage-logged* until long-term effects of fire on spotted owls and their prey are understood more fully" (emphasis added). Thus, the EA fails to address adverse impacts to the suitable habitat that Spotted Owls depend upon for the food they need to survive.

55. Not only does the most recent science demonstrate the importance of burned forest habitat to spotted owls, surveys conducted by the Forest Service in 2014 confirm California spotted owl

presence in the Aspen fire area in or near owl PACs and HRCAs that were re-mapped (*i.e.,* areas that the Forest Service claimed are unsuitable, and now plans to log). Yet, logging is nonetheless proposed to occur within 1.5 km of these owl survey locations, contrary to Bond et al. (2009).

56. The EA for the Project fails to adequately discuss or consider the best available data indicating loss of Spotted Owl occupancy from post-fire logging. Data sources showing loss of Spotted Owl occupancy after post-fire logging, which were submitted with Plaintiffs' comments, are simply not addressed at all in the Project EA, Wildlife BE, or Response to Comments documents.

57. Also ignored in the Aspen EA is the fact that the most current, and best available, science concludes that California spotted owl populations are declining (Conner et al. 2013, Tempel and Gutierrez 2013, Tempel 2014). The Aspen Project EA (e.g., p. 166) refused to even acknowledge the current science showing Spotted Owls are in decline on Forest Service lands.

58. When Plaintiffs submitted the 2013 and 2014 studies (demonstrating that California Spotted Owl populations are indeed declining) to the Forest Service during comments, stating that this new scientific information undermines outdated conclusions in the 2004 Framework, and outdated citations in the EA, the Forest Service responded with text apparently cut and pasted from some 2012 document, which argued that the new data on population declines of California Spotted Owls (the 2013 and 2014 studies cited above, which were submitted with Plaintiffs' comments) was not yet published (Aspen Project Response to Comments, p. 172). The Project EAs failed to adequately analyze this science, or adequately disclose the impacts or cumulative effects of logging post-fire habitat on spotted owls, including logging in moderate- and high-intensity fire areas within the pre-fire and post-fire boundaries of PACs and HRCAs.

59. The conclusion of the Aspen EA (p. 196) that "the Project may affect individuals, but is not likely to result in a trend toward Federal listing or loss of viability" of the California Spotted Owl is not based upon an analysis of the adverse impacts of planned post-fire logging on suitable foraging habitat created by moderate/high-intensity fire.

60. In summary, the Aspen EA and associated documents a) admitted that moderate/high-intensity fire areas are preferred (best) foraging habitat for California Spotted Owls, b) did not dispute

these findings or their reliability or reference any scientific data indicating that removal of foraging habitat is of no consequence to the owls, c) refused to respond to or address in any way the multiple scientific sources submitted by Plaintiffs showing that, when suitable foraging habitat created by high-intensity fire is removed by post-fire logging, Spotted Owl occupancy is reduced—often dramatically, and d) yet concluded, in the final analysis of impacts, that removal of suitable foraging habitat created by moderate/high-intensity fire equates to zero removal of habitat and zero adverse impact to the owls.

61. The U.S. Forest Service's Forest Service Manual (FSM), Amendment 2600-2005-1 (effective date: September 23, 2005), Section 2670.12, states: "Departmental Regulation 9500-4. This regulation directs the Forest Service to: 1. Manage 'habitats for all existing native and desired nonnative plants, fish, and wildlife species in order to maintain at least viable populations of such species.'" This requirement pertains with special force to Forest Service Sensitive Species, and Section 2670.22 states that following requirement for Sensitive Species: "Maintain viable populations of all native and desired nonnative wildlife, fish, and plant species in habitats distributed throughout their geographic range on National Forest System lands." The Forest Service also must not take actions that would contribute to a trend towards federal listing under the Endangered Species Act. FSM Section 2670.32. The Ninth Circuit Court of Appeals has held that, with regard to the Forest Service's obligations under NEPA for Sensitive Species, the Forest Service must determine the quantity and quality of habitat needed to maintain at least viable populations of the Sensitive Species, and must determine whether the individual project being considered would push such habitat below the critical threshold needed to maintain at least viable populations. *Ecology Center v. Austin*, 430 F.3d 1057, 1067-1068 (9th Cir. 2006), overruled on other grounds, *The Lands Council v. McNair*, 537 F.3d 981, 988, 990-994, 1001 (9th Cir. 2008) (*en banc*).

62. The Aspen EA failed to divulge the quantity and quality of habitat needed to maintain viable populations of California Spotted Owls on the Sierra National Forest and range-wide, and failed to divulge whether the Project would reduce such habitat below the critical threshold to maintain viable populations.

63. The Aspen project is also within the range of the Pacific Fisher, an extremely rare, mink-like mammal that the U.S. Fish and Wildlife Service has determined to be "warranted" for listing under the federal Endangered Species Act (ESA), based upon the biological science and threats, including logging. At that time (2004), listing was determined to be "precluded", however, due to other administrative priorities, but a new listing decision is expected in the fall of this year. *See* 78 Fed. Reg. 70104, 70117 (November 22, 2013) ("[The Fish and Wildlife Service] continue[s] to find that listing this species is warranted but precluded as of the date of publication of this notice of review. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted petition 12-month finding.").

64. The current science concludes that Pacific Fishers select dense, mature/old conifer forest for suitable denning and resting habitat (Zielinski et al. 2006, Purcell et al. 2009), but areas of mature/ old conifer forest that experience moderate/high-intensity fire are suitable foraging habitat, with Fishers using such areas at levels comparable to their use of unburned mature/old conifer forest (Hanson 2013). Hanson (2013) concluded that moderate/higher-severity fire occurring in dense, mature/old conifer forest creates suitable Fisher foraging habitat, and that post-fire logging would reduce or remove the structural components and complexity that makes post-fire habitat suitable for Fishers.

65. The Aspen EA (pp. 183-184) cursorily mentioned Hanson (2013), but failed to acknowledge that this study found Fisher use of moderate/high-intensity fire areas to equal that of unburned old forest and that this post-fire habitat is suitable Fisher habitat, and failed to acknowledge the conclusion of Hanson (2013) that post-fire logging would eliminate habitat suitability. On this faulty basis, the Forest Service categorized moderate/high-intensity fire areas as unsuitable for Fishers and based the impacts analysis on this assumption (Aspen EA, pp. 183-184)—even as the Aspen Project Response to Comments (p. 62) acknowledges that Hanson (2013) found fishers preferentially selecting mixed-severity fire areas over unburned forests and using moderate/higher-severity fire areas at levels comparable to use of unburned old forest.

66. Both the Aspen EA and the Response to Comments fail to divulge that Hanson (2013) also found a statistically significant positive selection for larger proportions of higher-severity fire area by Pacific fishers, where higher-severity was defined as over 50% basal area mortality. The Aspen Project Response to Comments erroneously claimed (p. 62) not to understand the higher-severity fire definition used in Hanson (2013) (over 50% basal area mortality), despite the fact that this is the same definition used by the Forest Service to evaluate the Aspen project (Aspen EA, pp. 96, 178). The Aspen EA never addressed the actual findings of the study or considered these findings in assessing the true impacts of this project on Fisher habitat and survival.

67. The conclusion of the Aspen EA (p. 196) that "the Project may affect individuals, but is not likely to result in a trend toward Federal listing or loss of viability" of the Pacific Fisher is not based upon an analysis of the adverse impacts of planned post-fire logging on suitable foraging habitat created by moderate/high-intensity fire.

68. During scoping comments, and comments on the EA, Plaintiffs submitted detailed expert comments, and scientific sources, demonstrating that after a fire the forest naturally regenerates, *i.e.*, seeds from live trees within and around burned areas, and seeds buried under forest duff which did not get burned sprout and grow, beginning the next phase in the cycle of life for a fire adapted ecosystem. These scientific sources establish that substantial natural post-fire conifer regeneration occurs in high-intensity fire patches, including in the interior of such patches (more than two mature tree lengths into the patches), and that native shrubs do not preclude such conifer regeneration.

69. Plaintiffs also submitted data demonstrating that the one study which found relatively little natural post-fire conifer regeneration in high-intensity fire patches (Collins and Roller 2013) was conducted largely in areas that had been clearcut before or after the fires, and that the authors did not divulge that conifer seed source had been removed prior to the fires in the studied areas. Neither of the EA nor the Response to Comments documents acknowledged this information.

70. During scoping comments, and comments on the EA, Plaintiffs submitted detailed expert comments, and scientific sources, demonstrating that, contrary to the Forest Service's

hypothetical modeling assumptions/scenarios, post-fire logging, artificial conifer planting, and shrub removal does not, in fact, effectively prevent future high-intensity fire, and often *increases* fire intensity potential instead (Donato et al. 2006, Thompson et al. 2007, McGinnis et al. 2010, Donato et al. 2013).

71. In 2004, the Forest Service amended all forest plans in the Sierra Nevada management region, including those of the Sierra and Tahoe National Forests, with the 2004 Sierra Nevada Forest Plan Amendment (the "2004 Framework"). The 2004 Framework allows, among other things, up to 100% removal of snag forest habitat (complex early seral forest), elimination of all or a portion of California Spotted Owl PACs and HRCAs if the majority of the area experiences high-intensity fire, and post-fire logging of these portions of pre-fire PACs or HRCAs, based upon the assumption that moderate and high-intensity fire areas do not comprise suitable California Spotted Owl habitat, and that such fire effects eliminate habitat suitability for the owls, such that the logging of such areas will not adversely affect the owls (USFS 2004). The 2004 Framework assumed that high-intensity fire is unnaturally high currently in the Sierra Nevada and that it is causing substantial loss of occupancy. Further, the 2004 Framework assumed that, due to fire suppression, Sierra Nevada forests are now burning "almost exclusively" at high-intensity effects in areas that have missed natural fire return intervals, and that high-intensity fire results in a loss of ecological integrity and threatens ecological collapse.

72. Since 2004, significant new scientific information has arisen which has rendered invalid the assumptions upon which the 2004 Framework EIS and Record of Decision were based, and Plaintiffs submitted this new information to the Forest Service during comments on the Aspen Project. This information includes but is not limited to the following: a) California spotted owls preferentially select unlogged high-severity fire areas as suitable foraging habitat (Bond et al. 2009), and within burned forest they select the areas with highest overall density/complexity in terms of total basal area of trees (snags and live trees combined), indicating that high levels of standing snags in higher-severity areas is important to California spotted owls (Roberts 2008); b) California spotted owl reproduction is higher in unlogged mixed-severity fire areas than in unburned mature forest (Bond et al. 2002, Roberts

2008); c) California spotted owl occupancy is slightly higher in mixed-severity fire areas (average of 32% high-severity fire effects) than in unburned mature forests in the Sierra Nevada, while occupancy has been consistently lost in areas where "salvage" logging has removed post-fire habitat (Bond 2011, Lee et al. 2012); d) in unlogged mixed-severity fire areas, California spotted owls have home range sizes that are comparable to or smaller than those in unburned mature forest (indicating comparable territory fitness and habitat suitability in burned forest) (Bond et al. 2013); e) the only area in the Sierra Nevada in which California spotted owl populations are known to be stable or slightly increasing is an area with an active mixed-severity fire regime and no mechanical thinning or post-fire logging (Sequoia/Kings-Canyon National Park), while all study areas on national forests and private lands (characterized by aggressive reduction of fire due to fire suppression, landscape-level mechanical thinning, and common post-fire logging) have declining populations (Conner et al. 2013, Tempel and Gutiérrez 2013, Tempel 2014); f) due to fire suppression policies, there is now a deficit of high-intensity fire in the forests of the Sierra Nevada, and there is now only about one-fourth to one-half as much high-intensity fire as there was prior to the early 20th century, depending upon the estimates (Mallek et al. 2013, Baker 2014, Hanson and Odion 2014, Odion et al. 2014); g) high-intensity fire creates complex early seral forest (a.k.a., "snag forest habitat"), which is one of the rarest, most biodiverse and ecologically important, and most threatened of all forest habitat types (Burnett et al. 2010, Swanson et al. 2011, Odion et al. 2014); h) forests of the Sierra Nevada are burning mostly at low/moderate-intensity currently, and this is also true of the most fire-suppressed forests (those that have missed the most natural fire return intervals) (Odion and Hanson 2006, Odion and Hanson 2008, van Wagtendonk et al. 2012); i) due to fire suppression, we now have two to four times less high-intensity fire than we did historically (Mallek et al. 2013, Hanson and Odion 2014, Odion et al. 2014), and the most comprehensive analysis found that fire intensity is not increasing in the Sierra Nevada, and that Forest Service analyses to the contrary were based upon demonstrable methodological errors (Hanson and Odion 2014); j) due to the deficit of high-intensity fire from fire suppression, exacerbated by post-fire logging, Black-backed Woodpeckers are now very rare in the Sierra Nevada, and there is now a conservation concern about their populations, leading the Forest Service to produce a

Conservation Strategy for this species (Bond et al. 2012); k) Black-backed Woodpeckers strongly select large patches (generally at least 100-200 acres per pair) of recent moderate to high-intensity fire occurring in areas of pre-fire dense, mature/old conifer forest, indicating that maintaining such fire effects and habitat conditions are important for the conservation of this species (Hanson and North 2008, Siegel et al. 2013); l) a recent study concluded that current forest management, including removal of one-third or more of Black-backed Woodpecker habitat through post-fire logging, would cause a precipitous decline in Black-backed Woodpecker populations over the next three decades in the Sierra Nevada and eastern Oregon Cascades, creating a substantial risk of extinction (Odion and Hanson 2013); and m) Pacific Fishers actively use areas of unlogged moderate/high-intensity fire occurring in pre-fire dense, mature/old conifer forest—at levels comparable to their use of unburned old forest—and preferentially select mixed-intensity fire areas over unburned forest when they are near fire edges.

73. The Forest Service continues to manage national forests of the Sierra Nevada under the assumptions of the 2004 Framework, despite the significant new information that has arisen over the past decade. Brushing aside the large amount of new science submitted by Plaintiffs—science which shows that the 2004 Framework's conclusions and assumptions are inaccurate and outdated—the Forest Service, replied: "The 2004 SNFPA decision has not been vacated by the courts and the decision, with its standards and guidelines, remains in effect. The Aspen project is in compliance with the 2004 Framework decision and its standards and guidelines." Aspen Project Response to Comments, p. 176.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of NEPA and the APA

Failure to Prepare an Environmental Impact Statement

74. Plaintiffs incorporate by reference all preceding paragraphs.

75. Based on the evidence in the record, the Aspen Project will likely have significant adverse impacts and cumulative effects to California Spotted Owls (a designated Sensitive Species),

and Black-backed Woodpeckers and the habitat type and suite of species which they represent. The record also indicates that the Aspen Project would have significant or potentially significant adverse impacts on Pacific Fishers—a Candidate Species under the ESA. Further, the Forest Service has failed to provide a convincing statement of reasons to support their decision not to prepare an EIS.

76. Defendants' decision to implement the Aspen Project without preparing an Environmental Impact Statement, and without articulating a convincing statement of reasons for the decision not to prepare an EIS, violates NEPA and its regulations (40 C.F.R. § 1508.27) and was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA. 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

Violation of NEPA and the APA

Significant New Information and Failure to Supplement the 2004 Framework

77. Plaintiffs incorporate by reference all preceding paragraphs.

78. Defendants' Aspen EA relies on aspects of the 2004 Framework which have been rendered outdated and invalid due to significant new scientific information and changed circumstances. For example, new science demonstrates that many of the assumptions in the 2004 Framework are not scientifically valid, and yet the Forest Service relies on those assumptions instead of making the required changes to their outdated Forest Plan, or adapting their management on site specific projects to reflect this new information.

79. Defendants' failure to prepare a supplemental EIS to the 2004 Framework, as required by the NEPA, and NEPA's implementing regulations, 40 C.F.R. § 1508.9(c), represent agency action which is arbitrary, capricious, an abuse of discretion, in excess of statutory authority and limitations, and not in accordance with the law and procedures required by law. 5 U.S.C. § 706 (2).

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THIRD CLAIM FOR RELIEF

Violations of NEPA and the APA

Failure to Take a Hard Look, To Adequately Explain Impacts, To Provide Necessary Information, To Ensure Scientific Integrity, To Respond to Dissenting Scientific Opinion, and To Articulate a Reasonable Purpose and Need

80. Plaintiffs incorporate by reference all preceding paragraphs.

81. Pursuant to NEPA, Defendants must take a "hard look" at the consequences, environmental impacts, and adverse effects, including cumulative effects, of proposed actions. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9. Further, the Forest Service must adequately explain its impacts assessment, provide any necessary information for understanding and evaluating its decisions, ensure scientific accuracy and integrity in NEPA documents, and must also clearly divulge its methodologies for key findings, articulate a purpose and need which is not unreasonably narrow, and respond directly to dissenting scientific opinion. *Id.* § 1502.1, 1502.9, 1502.24.

82. The Forest Service failed to analyze, or adequately analyze, impacts and cumulative effects of the Aspen Project with regard to California Spotted Owls, Black-backed Woodpeckers, and Pacific Fishers.

83. Defendants' decision to implement the Project without taking the requisite "hard look" at environmental impacts and cumulative effects, without ensuring scientific accuracy and integrity, without adequately explaining the impacts assessment, without providing necessary information, without articulating a reasonable purpose and need, and without adequately disclosing methodologies or directly responding to dissenting science with regard to California Spotted Owls, Black-backed Woodpeckers, and Pacific Fishers, violates NEPA and its regulations, and was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA. 5 U.S.C. § 706(2).

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FOURTH CLAIM FOR RELIEF

Violation of NFMA and the APA

Failure to Consider the Best Available Science

84. Plaintiffs incorporate by reference all preceding paragraphs.

85. Defendants' Aspen EA failed to carefully consider the best available science with regard to California Spotted Owls, Black-backed Woodpeckers, and Pacific Fishers, and the science on these subjects submitted by Plaintiffs to the Forest Service directly undermines the Forest Service's conclusions/assumptions, and/or shows the Forest Service's studies or positions to be outdated or flawed.

86. Defendants' failure to consider the best available science with regard to California Spotted Owls, Black-backed Woodpeckers, and Pacific Fishers, as required by the NFMA, and NFMA's implementing regulations, 36 C.F.R. § 219.35(a), is arbitrary, capricious, an abuse of discretion, in excess of statutory authority and limitations, and not in accordance with the law and procedures required by law. 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

1. Declare that Defendants violated NEPA, NFMA, the APA, and implementing regulations, in preparing and approving the Aspen Project EA, Decision Notice, and FONSI;

2. Declare that there exists significant new information rendering the 2004 Framework outdated and obsolete with regard to wildlife relationships with fire, and necessitating the preparation of a supplemental EIS;

3. Enjoin Defendants from awarding or implementing the Project, except for felling of hazard trees that could otherwise fall on and hit roads maintained for public use, trails or administrative structures, until Defendants have complied with NEPA, NFMA, the APA, and implementing regulations;

4. Award Plaintiffs their costs and attorneys fees under the Equal Access to Justice Act; and

5. Grant Plaintiffs such other and further relief as the Court deems just and equitable.

Respectfully submitted,

Dated: July 27, 2014

/s/ Rachel M. Fazio

Rachel M. Fazio (CA Bar No. 187580)
P.O. Box 897
Big Bear City, CA 92314
Telephone: (530) 273-9290
rachelmfazio@gmail.com

Justin Augustine (CA Bar No. 235561)
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA 94104
Telephone: (415) 436-9682
Facsimile: (415) 436-9683
jaugustine@biologicaldiversity.org

Attorneys for Plaintiffs