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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA
14 FRESNO DIVISION
15

16 EARTH ISLAND INSTITUTE and
17 SEQUOIA FORESTKEEPER,

18 Plaintiffs,

19 v.

20 KEVIN ELLIOTT, in his official capacity as
the Forest Supervisor of the Sequoia National
21 Forest; and the UNITED STATES FOREST
SERVICE,
22

23 Defendants.
24
25
26
27
28

No.:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Administrative Procedure Act, 5 U.S.C. §§
701 *et seq.*)

1 **INTRODUCTION**

2 1. This is a civil action for declaratory and injunctive relief, which stems from
3 Federal Defendants’ (the Forest Service’s) actions related to the Bull Run Roadside Hazard Tree
4 Mitigation Project (Bull Run Project), which proposes to allow logging of 3,500 acres along 50.2
5 miles of road in the Cedar Fire area in the Greenhorn Mountains of the Sequoia National Forest.
6 This project is directly linked to an identical proposal called the Spear Creek Roadside Hazard
7 Tree Mitigation Project (Spear Creek Project), which would log an additional 1,250 acres along
8 24 miles of road and is located along connecting roads directly adjacent to the Bull Run Project
9 area in the Giant Sequoia National Monument (GSNM).

10 2. After the Cedar Fire burned roughly 29,000 acres in the Greenhorn Mountains of
11 the Sequoia National Forest, the Forest Service proposed to mitigate public safety hazards from
12 dead or dying trees, which may fall onto the roadway, by logging up to 300 feet from each side
13 of 74 miles of roads in the fire area. But rather than just felling these trees and closing non-
14 essential roads for public safety, which would avert the falling hazard, the Forest Service has
15 proposed to log and sell the trees in the Bull Run Project as a timber salvage sale. The Forest
16 Service has stated that it could close, at least temporarily, some of the unnecessary roads, rather
17 than log them.

18 3. Logging in the Bull Run and adjacent Spear Creek Project areas will significantly
19 and adversely affect resident California spotted owls, Pacific fishers, and the mountain yellow-
20 legged frog (MYLF), which is Federally listed as “endangered” under the Endangered Species
21 Act (ESA).

22 4. With respect to the MYLF, the Forest Service and U.S. Fish and Wildlife Service
23 have determined that the Bull Run Project “*may affect and is likely to adversely affect*” the
24 species. Yet the Forest Service has failed to explain why the Project’s effects would be
25 insignificant, even though the Forest Service admits that project activities may kill frogs.

26 5. And while the Pacific fisher and California spotted owl are listed as Forest
27 Service “sensitive species,” whose population viability is in question and/or in decline, the Forest
28 Service has decided to forgo a detailed environmental analysis, even though the logging will

1 adversely and may significantly affect these species. Instead, the Forest Service has
2 categorically-excluded the project from a detailed analysis in an Environmental Assessment
3 (EA) or Environmental Impact Statement (EIS).

4 6. Plaintiffs seek a declaration that the Forest Service has violated the National
5 Environmental Policy Act (NEPA) by proceeding with the Bull Run Project without the
6 necessary environmental analysis, and an injunction to mitigate harms from project activities on
7 sensitive and endangered wildlife and their habitats in the Bull Run Project area.

8 7. The Forest Service has violated NEPA in several ways. First, the Forest Service
9 has authorized a 3,500 acre timber salvage project, exceeding the 250 acre limit for a categorical
10 exclusion of this type, and instead must prepare at least an EA. Moreover, its choice of a
11 categorical exclusion for timber stand and wildlife habitat improvement does not fit with the
12 timber salvage actions proposed here.

13 8. Second, the Forest Service has failed to explain why their determination that the
14 Bull Run Project “*may affect and is likely to adversely affect*” and even kill MYLFs is
15 insignificant. It has also failed to explain, when it found potentially significant concerns about
16 Pacific fisher habitat connectivity in its decision to re-analyze its Rancheria Project due to the
17 Cedar Fire, why the additional exacerbation of habitat connectivity effects from logging the Bull
18 Run and Spear Creek Project areas are insignificant. Also, it has failed to explain, given the new
19 evidence that logging levels as low as 5-25% within a 1500-meter radius of territory centers
20 causes severe adverse impacts on owl occupancy, why timber salvage activities within the
21 California spotted owl territories in the Bull Run and Spear Creek Project areas are insignificant.
22 In doing so, the Forest Service has failed to explain or supply a convincing statement why these
23 adverse effects to endangered and sensitive wildlife species do not constitute “extraordinary
24 circumstances,” precluding the use of categorical exclusions and requiring a detailed NEPA
25 analysis in an EA or EIS.

26 9. Third, the Forest Service has improperly segmented the Bull Run Project from the
27 Spear Creek Project and analysis, whereas NEPA regulations require that proposals or parts of
28

1 proposals which are related to each other closely enough to be, in effect, a single course of action
2 shall be evaluated in a single analysis.

3 **JURISDICTION AND VENUE**

4 10. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
5 question), 5 U.S.C. §§ 701 et seq. (Administrative Procedure Act) and 28 U.S.C. §§ 2201 and
6 2202 (Declaratory Judgment Act). Plaintiffs have exhausted all administrative remedies and the
7 violations of law claimed below are ripe for judicial review.

8 11. Venue lies in the Eastern District of California, pursuant to 28 U.S.C. § 1391(e),
9 because the property and events giving rise to this suit occur in this District and because one of
10 the Plaintiffs, Sequoia ForestKeeper, resides within the District.

11 12. An actual judicable controversy exists between the parties hereto.

12 **INTRADISTRICT VENUE**

13 13. Similarly, because a substantial part of one of the events or omissions which give
14 rise to the claims herein—the Bull Run and Spear Creek Projects—occurred in Kern and Tulare
15 Counties, assignment to the Fresno Division of this Court is proper under Civil Local Rule
16 120(d).

17 **PARTIES**

18 14. Plaintiff EARTH ISLAND INSTITUTE (EII) is a nonprofit corporation organized
19 under the laws of the State of California. EII is headquartered in Berkeley, California. EII's
20 mission is to develop and support projects that counteract threats to the biological and cultural
21 diversity that sustains the environment. Through education and activism, these projects promote
22 the conservation, preservation and restoration of the earth. One of these projects is the John
23 Muir Project—whose mission is to protect all federal public forestlands from commercial
24 exploitation that undermines and compromises science-based ecological management. John
25 Muir Project offices are in San Bernardino County, California. EII is a membership organization
26 with over 15,000 members in the U.S., over 3,000 of whom use and enjoy the National Forests of
27 California for recreational, educational, aesthetic, spiritual, and other purposes. EII through its
28 John Muir Project (JMP) has a longstanding interest in protection of national forests. EII's John

1 Muir Project and EII members actively participate in governmental decision-making processes
2 with respect to national forest lands in California and rely on information provided through the
3 NEPA processes to increase the effectiveness of their participation. EII's members include
4 individuals who regularly use and continue to use public lands within the Southern Sierra
5 Nevada National Forests, including the exact tracts of lands in the Bull Run and Spear Creek
6 Project areas proposed for logging, in particular, for scientific study, recreational enjoyment,
7 aesthetic beauty, and nature photography. These members' interests will be irreparably harmed
8 by the planned logging, as they will no longer be able to scientifically study these areas in their
9 pre-logging state, take nature photographs of the area in its pre-logging state, or enjoy the
10 aesthetic beauty of the unlogged forest habitat and its inhabitants.

11 15. Plaintiff SEQUOIA FORESTKEEPER (SFK) is a non-profit corporation residing in
12 Kernville, California. Its mission is to protect and restore the ecosystems of the Southern Sierra
13 Nevada, including, but not limited to, the Giant Sequoia National Monument, Sequoia National
14 Forest, and Mountain Home State Forest through monitoring, enforcement, education, and
15 litigation. Sequoia ForestKeeper's members, many of whom reside in local areas including
16 Kern, Tulare, Fresno, and Kings Counties, and others who visit from across the country, use and
17 continue to use the national forests of the Southern Sierra Nevada for activities such as hiking,
18 bird and animal watching, aesthetic enjoyment, quiet contemplation, fishing, scientific study, and
19 to improve their health, including the exact tracts of the lands and waters that are now planned
20 for logging as part of the Bull Run and Spear Creek Projects. Many of its members also have
21 been actively involved in formulating management policies for public lands and preserving local
22 areas, including participating in revising the Sequoia National Forest plan and the establishment
23 and development of the Giant Sequoia National Monument.

24 16. This suit is brought by EII and SFK on behalf of themselves and their adversely
25 affected members and staff. Plaintiffs and their members' present and future interests in and use
26 of the Bull Run and Spear Creek Project areas are and will be directly and adversely affected by
27 the agency's impending actions. Those adverse effects include, but are not limited to: (1)
28 impacts to native plants and wildlife and their habitats within and around the Project areas from

1 logging; (2) reduction and impairment of recreation opportunities; (3) impaired aesthetic value of
2 forest lands, trails, and landscapes caused by Defendants' logging; and (4) loss of scientific study
3 and viewing opportunities with regard to wildlife in areas proposed for logging. In addition,
4 Plaintiffs and their members and staff have an interest in ensuring that Defendants comply with
5 all applicable laws, regulations, and procedures pertaining to the management of national forest
6 lands.

7 17. The Forest Service's implementation of the Bull Run and Spear Creek Projects is
8 in contravention of the National Environmental Policy Act (NEPA). Because Defendants'
9 actions approving the Project violate the law, a favorable decision by this Court will redress the
10 actual and imminent injury to Plaintiffs. If the Forest Service were to comply with NEPA it
11 would supplement its environmental analyses and prepare Environmental Assessments (EA's) or
12 Environmental Impact Statements (EIS's) to consider the significant effects from these projects,
13 given the significant effects on Pacific fishers, California spotted owls, and mountain yellow-
14 legged frogs. The analysis would consider additional alternatives to proposed actions and could
15 minimize or avert the harm to Plaintiffs' members that will be caused from the logging of trees
16 and destruction of wildlife habitat by the proposed actions.

17 18. Defendant KEVIN ELLIOTT is sued in his official capacity as the Forest
18 Supervisor of the Sequoia National Forest of the United States Forest Service. Supervisor Elliott
19 is directly responsible for forest management in the Sequoia National Forest and for ensuring
20 that all resource management decisions comply with applicable laws and regulations. Supervisor
21 Elliott signed the decision for the Bull Run Project challenged here.

22 19. Defendant UNITED STATES FOREST SERVICE is a federal government
23 agency within the Department of Agriculture, which holds the National Forests in trust for the
24 American people and is responsible for actions in the Bull Run and Spear Creek Project areas.

25 **FACTS**

26 The Bull Run and Spear Creek Projects

27 20. The Bull Run and Spear Creek Projects are located in the Greenhorn Mountains
28 of the Sequoia National Forest, which is draped by mixed conifer and white fir forest, and is

1 interspersed by recovering burned, logged, and un-forested areas, including chaparral. Mixed
2 conifer and white fir forests provide essential wildlife habitat, hiding cover, and core habitat for
3 old forest-dependent wildlife, including the Pacific fisher and the California spotted owl.

4 21. At approximately 4:30 p.m., August 16, 2016, the human-caused Cedar Fire
5 started burning near Cedar Creek and burned into the Greenhorn Mountains. After four weeks,
6 the fire grew to more than 29,000 acres.

7 22. The Cedar Fire burned with mixed severity, and the unlogged forest in the Cedar
8 Fire area continues to provide essential wildlife habitat for old forest-dependent species. The fire
9 also created new forest habitat types, including complex early seral forest habitat, also known as
10 “snag forest” habitat, which, if left unlogged, serves as important habitat for small mammals and
11 birds, and essential habitat for the fire-adapted black-backed woodpecker. Recent detections
12 have found black-backed woodpeckers in the Cedar Fire and Bull Run Project area, which have
13 been confirmed as the southern-most detections of the species in the United States. Predators,
14 including California spotted owls and Pacific fishers, seek out these burned areas due to their
15 abundance of small mammal prey species.

16 23. On October 31, 2016, the Forest Service issued a News Release announcing that it
17 was planning a commercial timber sale project in the Cedar Fire area to remove trees determined
18 to be hazardous along area roads, including within areas of the Giant Sequoia National
19 Monument (GSNM) burned in the Cedar Fire.

20 24. In response, SFK immediately made inquiries with the Forest Service about the
21 project, asking Forest Service District Ranger Eric LaPrice to answer a number of basic
22 questions about the proposal, including the proposed commercial logging in the GSNM where
23 logging is severely restricted.

24 25. On November 30, 2016, Mr. La Price formally responded to SFK via letter and
25 included two detailed maps of the areas proposed for roadside hazard tree logging. In the letter,
26 La Price explained that

- 27 • the news release started scoping for the project;

- 1 • the Forest Service was now thinking of preparing two separate projects: Spear
2 Creek Roadside Hazard Trees (Spear Creek Project) and Bull Run Creek
3 Roadside Hazard Trees (Bull Run Project); and
- 4 • he was “intending to prepare two environmental assessments (EA), one for each
5 project, *since we are proposing removal of excess material with a commercial*
6 *sale.*” (emphasis added).

7 26. On November 30, 2016, JMP’s Dr. Chad Hanson provided initial scoping
8 comments, which included a request to consider several alternatives, including: (a) limit hazard
9 tree felling to trees that are likely to fall and hit the road in question; (b) leave all or most felled
10 trees on the ground as large downed log habitat for wildlife; and (c) drop the roadside logging
11 proposed in the Giant Sequoia National Monument along roads 24S93, 24S94, 24S93A, and
12 24S93B and instead convert these segments to Maintenance Level 1 roads (meaning a
13 temporary/indefinite closure, but not necessarily a permanent closure, with a gate).

14 27. On December 2, 2016, Mr. La Price responded to a number of additional
15 questions from JMP’s Dr. Chad Hanson, stating that the Forest Service was looking at preparing
16 two EAs because one of the projects was within and the other was outside the Giant Sequoia
17 National Monument, since one area was subject to the Monument Plan and other would be
18 subject to the Sequoia Forest Plan. He asserted that because there are different requirements for
19 each Plan, the Forest Service thought it best to separate them for the purpose of clarity. *But he*
20 *also acknowledged that the Forest Service could do one large EA for both projects.*

21 28. On December 15, 2016, JMP’s Dr. Chad Hanson submitted supplemental
22 comments, which pointed out new scientific findings about the adverse effects from post-fire
23 logging on California spotted owls. His comments included a copy of a new Endangered Species
24 Act (ESA) listing petition for the California spotted owl, which had been submitted to the U.S.
25 Fish and Wildlife Service (FWS), requesting that the owl be listed as threatened or endangered.
26 In response, the FWS issued a 90 day finding that the petition presented substantial scientific or
27 commercial information indicating that the petitioned action may be warranted. Dr. Hanson also
28

1 pointed out that the removal of trees along the roads in Bull Run and Spear Creek degrades or
2 eliminates preferred spotted owl foraging habitat and is associated with loss of territory
3 occupancy, citing to Bond and Hanson 2014 (the California spotted owl ESA listing petition).
4 Moreover, his comments stressed that NEPA required that the two projects should be considered
5 together in one EA or EIS since they are related to each other closely enough to be, in effect, a
6 single course of action.

7 29. On December 20, 2016, SFK submitted detailed scoping comments, in which
8 SFK requested consideration of several alternatives in the proposed EAs, including (a) no action,
9 to deal only with imminent hazards as an emergency measure, which would be felled and left;
10 (b) an alternative that reduces treatments by removing various road sections from the proposal
11 and closes those roads to public access; (c) a fell and leave only alternative, especially in the
12 Monument, to leave tree boles as large down woody material, and remove only the tops, limbs,
13 and slash to avert fuel loading and fire risk, explaining that such an alternative is feasible and
14 was studied in detail as an alternative in the Piute Fire Roadside Hazard Project in another area
15 of the Sequoia National Forest; (d) a alternative that only felled trees within 150 feet from each
16 side of the roads (the traditional distance for these types of projects), instead of the proposed 300
17 feet; and (e) an alternative that combines aspects of each of the alternatives proposed above.

18 30. On February 14, 2017, Forest Supervisor Kevin Elliott sent out a new and more
19 formal scoping letter seeking comments on the Bull Run Project proposal by March 15, 2017,
20 again stating that commercial logging could be included. Even though the project size had
21 greatly increased from 2,000 acres to 3,500 acres, Mr. Elliott was now contemplating the use of
22 categorical exclusions, asserting that during the early scoping period the Forest Service had not
23 identified potentially significant issues or concerns, and which found no extraordinary
24 circumstances. In his letter, Mr. Elliott stated that if the Forest Service does not mitigate the
25 roadside hazards, it would have to close a large network of roads for public safety, clearly
26 indicating that closing roads is a potential option.

27 31. On March 15, 2017, SFK submitted highly critical and very specific comments
28 with regard to Mr. Elliott's changed approach to the Bull Run Project, including concerns about

1 using categorical exclusions (CEs) instead of a more rigorous Environmental Assessment (EA)
2 for a commercial timber salvage sale of such a large size (3,500 acres) when previous
3 correspondence indicated the use of an EA. SFK also documented that previous similar projects
4 in the Sequoia National Forest had always developed EAs, and NEPA rules limit the use of CEs
5 for these types of projects if they are 250 acres and smaller. SFK also pointed out several
6 significant issues and concerns, including extraordinary circumstances regarding effects from
7 logging on sensitive and endangered species, including the Pacific fisher, California spotted owl,
8 and mountain yellow-legged frog. Moreover, SFK also explained why segmentation of the Bull
9 Run project and its analysis from the Spear Creek project violated NEPA.

10 32. On March 16, 2017, JMP submitted additional comments regarding the Bull Run
11 Project.

12 33. On May 1, 2017, Forest Supervisor Kevin Elliott sent out a new and more formal
13 scoping letter, seeking comments on the Spear Creek Project proposal by May 24, 2017. In the
14 letter he also stated that commercial logging could be included, even though the project is
15 located in the Giant Sequoia National Monument where commercial logging is generally
16 prohibited and tree removal is strictly limited. Just as he did with the Bull Run Project proposal,
17 Mr. Elliott stated the Forest Service planned to use categorical exclusions because the Forest
18 Service had not identified potentially significant concerns and no extraordinary circumstances.
19 Mr. Elliott also stated that a failure to mitigate hazards from dead and dying trees would cause
20 the Forest Service to close roads for public safety, clearly indicating that closing roads is an
21 option.

22 34. On May 15, 2017, JMP submitted comments regarding the Spear Creek Project.

23 35. On May 24, 2017, SFK also submitted extensive and very specific comments with
24 regard to Mr. Elliott's changed approach to the Spear Creek Project, which also served as
25 additional supplemental comments for the Bull Run Project. The comments mirror SFK's
26 concerns in its Bull Run Project comments, requesting several alternatives, including closure of
27 certain roads not needed for public access, concerns about segmentation of the project and its
28 analysis from the Bull Run Project, adverse effects to sensitive and endangered species which

1 constitute extraordinary circumstances and preclude the use of CEs, and the fact that the 1,250
2 acre project greatly exceeds the 250 acre limit of a commercial timber salvage CE.

3 36. On July 12, 2017, JMP submitted further scoping comments on the proposed Bull
4 Run Project, which show severe adverse impacts on California spotted owl occupancy from post-
5 fire logging within a 1500-meter radius of territory centers—even at levels that may seem
6 relatively low (5-25%), suggesting that these data underscore the need for an EA or EIS, not a
7 CE, for the Bull Run and Spear Creek proposals, which JMP considers a single logging proposal.

8 37. On July 19, 2017, SFK submitted a supplemental comment letter, documenting
9 the detection of black-backed woodpeckers in the Cedar Fire and Bull Run Project area with
10 photographs and location information, confirming that this was now the southern-most detection
11 of black-backed woodpeckers in the United States.

12 38. Despite the many concerns expressed by SFK and JMP, on August 30, 2017,
13 Forest Supervisor Elliott issued his decision memorandum (DM) using two categories to exclude
14 the Bull Run Project from a detailed NEPA analysis in an EA or EIS, also allowing the project to
15 move forward as a timber salvage sale.

16 39. The Bull Run Project DM states that, in consultation with the U.S. Fish and
17 Wildlife Service, the Forest Service found that the proposed tree felling and logging “may affect
18 and is likely to adversely affect” the endangered mountain yellow-legged frog (MYLF). This
19 conclusion is based on upon the Forest Service’s inability to guarantee that no take of the species
20 or its habitat would occur with implementation of the project, and in fact the Forest Service
21 concluded that project actions have the potential to negatively impact individuals (crush, injure,
22 or trap) if present during operations. Yet neither the Bull Run Project DM nor its Biological
23 Assessment explains why the project actions and this finding do not constitute a significant effect
24 or extraordinary circumstance.

25 40. On September 12, 2017, the Forest Service advertised the Bull Run Roadside
26 Hazard Timber sale in the Porterville Recorder, which offers 5.885 million board feet (5,885
27 Mbf) of saw logs for salvage. Bidders submitted their bids by 10 am on September 26, 2017.
28 The bid prospectus for the Bull Run Timber Sale states that “This is a fire salvage sale....”

1 41. On September 27, 2019, counsel for the Department of Justice informed
2 Plaintiffs' counsel that the Forest Service had awarded the Bull Run Timber Sale contract to
3 Sierra Forest Products of Terra Bella, California.

4 Endangered and Forest Service Sensitive Species

5 42. The Bull Run and Spear Creek Project areas contain habitat and resident
6 endangered and Forest Service sensitive species.

7 Mountain Yellow-Legged Frogs

8 43. Endangered species are species listed by the U.S. Fish and Wildlife and defined as
9 species that are in danger of extinction throughout all or a significant portion of their range,
10 which are also the most protected of the listed species.

11 44. On April 24, 2014, the U.S. Fish and Wildlife Service published the final rule
12 under the Endangered Species Act to list the northern distinct population segment (NDPS) of the
13 mountain yellow-legged frog (*Rana muscosa*) (MYLF) as an endangered species.

14 45. The MYLF will be adversely affect by the Bull Run and Spear Creek Projects.

15 46. MYLF habitat in the Bull Run Project area consists of streams, meadow, and
16 riparian conservation areas (RCAs) within the 300 foot treatment buffers on each side of the
17 proposed for roadside hazard logging. Based on these parameters the Forest Service estimates
18 that a total of 680 acres of suitable habitat occurs, of which an estimated 197 acres of suitable
19 habitat would overlap with roadside areas where tree felling and logging is proposed. These
20 acreages include a 25 meter buffer (82 feet) on each side of aquatic features such as perennial
21 and intermittent streams, seeps, springs and meadows as defined as suitable habitat by the
22 USFWS. In addition, RCA acres as designated under the 2004 Sierra Nevada Forest Plan
23 Amendment within this same area is estimated at 1,783 acres, of which an estimated 537 acres
24 intersect with the 300 foot road treatment buffer proposed for treatment.

25 47. In high elevation areas adult frogs make local movements during the late summer
26 and fall active season—adults typically move only a few hundred meters, although distances
27 over 1 km have been recorded that included overland travel. In lower elevation habitats, such as
28 those of the Bull Run Project area, the frogs would be active and would move far from water all

1 the way through October and into early November, since winter at that elevation does not set in
2 until at least mid/late-November. Therefore, minimal mitigations for MYLF within the 25 meter
3 buffer or in RCAs will not be sufficiently adequate, and logging equipment and felled trees in
4 areas where frogs move outside of the 25 meter buffer and RCAs could also crush resident frogs
5 through early November.

6 48. Despite design features to minimize impacts within buffers and RCAs, felling
7 hazard trees still presents some vulnerability such as disturbance and/or destruction of individual
8 frog egg masses, tadpoles, and post-metamorphic life stages. Individuals can be crushed and
9 killed, or trapped by falling trees.

10 49. The Bull Run Project area has known historical occurrences of the MYLF species,
11 but comprehensive surveys have not been conducted within the action area. Although surveys in
12 the years 2000 and 2001 by the California Academy of Sciences were conducted in perennial
13 streams located in adjacent areas of the Greenhorn Mountains, and these surveys did not detect
14 the species, without comprehensive surveys it is unknown if MYLFs occur within the action
15 area.

16 50. Thus, the U.S. Fish and Wildlife Service has concluded that actions in the Bull
17 Run Project could cause a “taking” of individual mountain yellow-legged frogs, including eggs,
18 tadpoles, sub-adults, and adults due to direct death or injury from humans, machines, and harm
19 and harassment through habitat modification (*e.g.* as a result of mechanical vegetation removal,
20 and other associated project activities).

21 51. Because mitigations cannot eliminate the possibility of a “taking,” the Forest
22 Service and U.S. Fish and Wildlife Service have determined that the Bull Run Project “*may*
23 ***affect and is likely to adversely affect***” the MYLF.

24 52. Yet the Forest Service has failed to include any explanation for why the Project’s
25 actions would have insignificant effects on MYLF and has failed to explain why this taking of an
26 endangered species does not constitute an extraordinary circumstance, which would preclude the
27 use of a categorical exclusion and instead require preparation of an EA or EIS.

1 Pacific Fishers and California Spotted Owls

2 53. Forest Service sensitive species are defined as plant and animal species identified
3 by a Regional Forester for which population viability is a concern as evidenced by significant
4 current or predicted downward trend in numbers or density.

5 54. Pacific fishers and California spotted owls are Forest Service sensitive species
6 that will be adversely affect by the Bull Run and Spear Creek Projects.

7 55. The Pacific fisher (*Pekania pennanti*) is a forest-dwelling mammal in a family
8 that includes weasels, mink, martens, and otters. They are about the size of a large house cat and
9 are light brown to dark blackish-brown. The fisher has a long body with short legs and a long
10 bushy tail.

11 56. Pacific fishers, for denning/resting habitat, require moderate to dense forest
12 canopy cover, avoid non-forested habitats with little or no cover, and prefer habitat with an
13 abundance of complex forest structural components such as trees with cavities, large down logs,
14 and large snags (standing dead trees). Fishers are strongly associated with unfragmented,
15 mature, and late successional (old growth) conifer and mixed hardwood conifer forests.

16 57. The Bull Run and Spear Creek Projects are entirely within the Southern Sierra
17 Fisher Conservation Area (Fisher Conservation Area). The Fisher Conservation Area
18 encompasses the known occupied range of Pacific fishers on National Forest System land in the
19 Sierra Nevada, and consists of an elevation band from 3,500 feet to 8,000 feet on the Sierra and
20 Sequoia National Forests, which provides habitat for the southernmost population of Pacific
21 fishers in the world. The Fisher Conservation Area was established to maintain and expand the
22 fisher population of the southern Sierra Nevada.

23 58. Estimates of the Southern Sierra fisher population range from 100 to 500
24 individual fishers, including one estimate of 300 individuals, although other estimates have
25 found only 50 to 120 reproductive adult females in that same population.

26 59. The Southern Sierra Pacific fisher population is listed by the State of California as
27 a threatened species under the California Endangered Species Act. The fisher is listed by the
28 Forest Service as a "Sensitive Species."

1 60. In 2014, the United States Fish and Wildlife Service (USFWS) proposed listing
2 the fisher under the federal Endangered Species Act (ESA). 79 Fed. Reg. 60419 (Oct. 7, 2014).
3 However, the agency recently decided not to list the entire West Coast Pacific fisher population
4 under the Act. 74 Fed. Reg. 22710 (April 18, 2016). The USFWS’s decision not to list the
5 fisher has been recently challenged in *Center for Biological Diversity v. U.S. Fish and Wildlife*
6 *Service*, No. 3:16-cv-06040, Dkt. No. 1 (N.D. Cal. Oct. 19, 2016) (Complaint).

7 61. Logging of live trees and snags, thinning, and other treatments that change forest
8 structure or canopy cover degrade habitat for Pacific fishers. Scientific studies have found that
9 fishers avoided using treated areas when denning, resting, and foraging.

10 62. Scientific studies have found that fisher occupation of larger habitat areas begins
11 dropping quickly when forest management treatments, which include fuel reduction thinning,
12 prescribed fire, or pre-commercial (hand) thinning, exceed a rate of about 13% in 5 years. These
13 same studies conclude that treatment rates which exceed this rate may put fisher habitat and
14 fisher use of these areas at risk. Moreover, large mixed-intensity fires themselves do not equate
15 to loss of fisher habitat, and fishers have been documented to actively use areas of unlogged snag
16 forest habitat resulting from higher-intensity fire patches.

17 63. The Forest Service’s Fisher Conservation Strategy identifies connectivity as
18 “essential to sustaining and recovering the fisher population.” On April 12, 2017, the Forest
19 Service found that the habitat fragmentation and loss of connectivity caused by the effects of the
20 Cedar Fire was not considered in the 2013 Fisher Biological Evaluation for the Rancheria
21 Restoration Project, located to the south of the Cedar Fire area. It found that this change in
22 conditions may be significant and alter the conclusions made in the original determination for
23 this project, and determined that a supplemental environmental analysis for the Rancheria Project
24 was necessary.

25 64. In its May 24, 2017 comments, SFK pointed to this finding and also suggested
26 that the loss of habitat connectivity from the Cedar Fire, in combination with the Bull Run and
27 Spear Creek projects, would exacerbate the potential significant consequences of fisher habitat
28 connectivity by further isolating fishers in the southern Greenhorn Mountains, and potentially

1 causing an a even greater risk of extirpation of fisher populations to the south of the Cedar Fire
2 area. SFK's fisher expert, Dr. Chad Hanson, found that the cumulative impacts from proposed
3 post-fire logging in the Cedar fire would be a likely adverse effect on habitat connectivity,
4 contributing to isolation of the fisher population in the Greenhorn Mountains south of the Cedar
5 fire.

6 65. The Bull Run Project analysis, however, failed to consider or determine whether
7 the additional habitat connectivity concerns from post-fire logging would have significant effects
8 on Pacific fishers to the south of the Cedar Fire area, similar to those found by the Forest Service
9 in the Rancheria Project. Moreover, the analysis fails to explain why these concerns do not
10 constitute an extraordinary circumstance, which would preclude the use of a categorical
11 exclusion and instead require preparation of an EA or EIS.

12 66. The California spotted owl is listed as a Forest Service sensitive species. The
13 U.S. Fish and Wildlife Service recently found that listing petitions for the California spotted owl
14 presented substantial scientific or commercial information indicating that Endangered Species
15 Act (ESA) listing may be warranted and is undertaking a status review of the species. 80 Fed.
16 Reg. 56423, 56426 (Sept. 18, 2015).

17 67. Like its cousins the Mexican and northern spotted owls, the California spotted
18 owl is a bellwether of old-growth forests. The California spotted owl is closely associated with
19 habitat similar to that of the Pacific fisher. The Bull Run and Spear Creek Project areas are
20 located predominantly in old-growth forest and include multiple California spotted owl Protected
21 Activity Centers (PACs) and Home Range Core Areas (HRCAs).

22 68. Habitat destruction or degradation from logging and related thinning or fuel
23 reduction activities continues to pose a significant ongoing threat to the owl. Research findings
24 have consistently documented a correlation between mechanical reductions in canopy cover as
25 well as removal of snags, and adverse effects to California spotted owls.

26 69. California spotted owls show remarkable site fidelity. Even after large fires burn
27 through their habitat, California spotted owls in the Sierras continue to persist and even thrive in
28 these burned habitat areas, so long as their habitat remains unlogged. For example, after

1 eliminating areas where post-fire logging had occurred, in areas that remained unlogged,
2 scientists found that post-fire occupancy of owl territories remained high—71% occupancy in the
3 Lake Fire (5 of 7 territories), 72% occupancy in the King Fire (13 of 18 territories), 94%
4 occupancy in the Rim fire (33 of 35 territories), 100% occupancy in the Chips Fire (9 of 9
5 territories), 36% occupancy in the Old Fire (4 of 11 territories), and 100% occupancy in the
6 McNally Fire in the Sequoia National Forest (6 of 6 territories).

7 70. But the same scientific analysis also found severe adverse impacts on California
8 spotted owl occupancy from post-fire logging within a 1500-meter radius of territory centers—
9 even at logging levels as low as 5-25%. These findings indicate that the substantial loss of
10 California spotted owl occupancy following large fires is largely driven by post-fire logging of
11 complex early seral forest of “snag forest”—a habitat type created by high-severity fire effects in
12 mature conifer forest, and which the owls select for foraging, given the excellent small mammal
13 prey base in such habitat.

14 71. The Bull Run Project analysis, however, failed to consider or determine whether
15 these post-fire logging levels would cause a loss of occupancy of the owl territories in the Cedar
16 Fire area. Moreover, the analysis fails to explain why these concerns do not constitute an
17 extraordinary circumstance, which would preclude the use of a categorical exclusion and instead
18 require preparation of an EA or EIS.

19 The National Environmental Policy Act

20 72. Congress enacted the National Environmental Policy Act “[t]o declare a national
21 policy which will encourage productive and enjoyable harmony between man and his
22 environment; to promote efforts which will prevent or eliminate damage to the environment and
23 biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the
24 ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321.

25 73. To accomplish these purposes, NEPA requires all agencies of the federal
26 government to prepare a “detailed statement” that discusses the environmental impacts of, and
27 reasonable alternatives to, all “major Federal actions significantly affecting the quality of the
28 human environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an

1 environmental impact statement (“EIS”). The EIS must describe the adverse environmental
2 effects of the proposed action and alternatives to the proposed action. *Id.*

3 74. NEPA also requires that “all agencies of the Federal Government shall ... study,
4 develop, and describe appropriate alternatives to recommended courses of action in any proposal
5 which involves unresolved conflicts concerning alternative uses of available resources....” 42
6 U.S.C. § 4332(E); NEPA Section 102(2)(E); *see* 40 C.F.R. § 1507.2(d) (“This requirement of
7 section 102(2)(E) extends to all such proposals, not just the more limited scope of section
8 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.”).

9 75. The Council on Environmental Quality (CEQ) has promulgated regulations
10 implementing NEPA, which are binding on all federal agencies. 40 C.F.R. § 1507.1. The CEQ
11 regulations establish additional requirements for environmental impact statements (EIS’s) and
12 other requirements of NEPA. 40 C.F.R. § 1508.9. To further the purposes of NEPA, the Forest
13 Service has also promulgated its own NEPA regulations, *see* 36 C.F.R. § 220 *et seq.*, which are
14 binding upon the agency.

15 76. To determine whether a proposed action significantly affects the environment, the
16 agency must consider both the context and intensity of the proposed action, including whether
17 the project will take place in “ecologically critical areas,” whether it will affect endangered
18 species, whether the effects of the project are highly controversial or uncertain, and whether the
19 project is related to other actions with individually insignificant but cumulatively significant
20 impacts. 40 C.F.R. § 1508.27. In making its determinations, NEPA requires that the agency use
21 the best available data and ensure the scientific integrity, disclose opposing scientific viewpoints,
22 and follow specified procedures to address gaps in data and scientific uncertainty. 40 C.F.R. §§
23 1500.1, 1502.9, 1502.22, 1502.24.

24 77. To determine whether a proposed action significantly affects the environment,
25 and whether an EIS is required, the acting agency may first prepare an Environmental
26 Assessment (EA). 40 C.F.R. § 1508.9. An EA must provide sufficient evidence and analysis to
27 determine whether to prepare an EIS. *Id.* If the agency concludes that a project may have
28 significant impacts on the environment, it must prepare an EIS. 40 C.F.R. § 1501.4. If the EA

1 concludes that there are no significant impacts to the environment, the federal agency must
2 provide a detailed statement of reasons why the project's impacts are insignificant and issue a
3 "finding of no significant impact" (FONSI). 40 C.F.R § 1508.13.

4 78. Certain proposed actions are considered "categorically excluded" from detailed
5 NEPA analysis and do not require preparation of an EIS or an EA. *Id.* § 1508.4. The Forest
6 Service has promulgated numerous categorical exclusions, which require a project or case file
7 and decision memo to satisfy NEPA. *See* 36 C.F.R. § 220.6(e). In promulgating its CE's, the
8 Forest Service has acknowledged that "only routine actions that have no extraordinary
9 circumstances should be within categories for exclusion." 57 Fed. Reg. 43180 (1992).¹

10 79. The three relevant categorical exclusions in this case are:

11 (6) Timber stand and/or wildlife habitat improvement activities
12 that do not include the use of herbicides or do not require more
13 than 1 mile of low standard road construction. Examples include,
14 but are not limited to:

- 13 (i) Girdling trees to create snags;
- 14 (ii) Thinning or brush control to improve growth or to reduce
15 fire hazard including the opening of an existing road to a
16 dense timber stand;
- 15 (iii) Prescribed burning to control understory hardwoods in
16 stands of southern pine; and
- 16 (iv) Prescribed burning to reduce natural fuel build-up and
17 improve plant vigor.

17 (11) Post-fire rehabilitation activities, not to exceed 4,200 acres
18 (such as tree planting, fence replacement, habitat restoration,
19 heritage site restoration, repair of roads and trails, and repair of
20 damage to minor facilities such as campgrounds), to repair or
21 improve lands unlikely to recover to a management approved
22 condition from wildland fire damage, or to repair or replace minor
23 facilities damaged by fire. Such activities:

- 21 (i) Shall be conducted consistent with Agency and
22 Departmental procedures and applicable land and resource
23 management plans;
- 22 (ii) Shall not include the use of herbicides or pesticides or the
23 construction of new permanent roads or other new
24 permanent infrastructure; and
- 24 (iii) Shall be completed within 3 years following a wildland fire.

25 ¹ *See* at 73 Fed. Reg. 43,084, 43,091 (July 24, 2008) (final rule placing CE rules from the
26 Forest Service Handbook (FSH) to the CFR, explaining that "[t]his final rule is moving
27 established categories and language on extraordinary circumstances from the Forest Service
28 NEPA procedures previously located in FSH 1909.15 to 36 CFR 220.6. These categories and
requirements were established following public review and comment, in consultation with CEQ
and with CEQ's concurrence. The final rule does not add any new categories, nor does it
substantively alter existing requirements regarding extraordinary circumstances.").

1 (13) Salvage of dead and/or dying trees not to exceed 250 acres,
2 requiring no more than 1/2 mile of temporary road construction.
3 The proposed action may include incidental removal of live or
4 dead trees for landings, skid trails, and road clearing. Examples
5 include, but are not limited to:

- 6 (i) Harvest of a portion of a stand damaged by a wind or ice
7 event and construction of a short temporary road to access
8 the damaged trees, and
9 (ii) Harvest of fire-damaged trees.

10 36 C.F.R. § 220.6(e)(6), (11), and (13).

11 80. “Scoping is required for all Forest Service proposed actions, including those that
12 would appear to be categorically excluded from further analysis and documentation in an EA or
13 an EIS.” 36 C.F.R. § 220.4(e)(1).

14 81. If, based on scoping, the responsible official determines that “it is uncertain
15 whether [a] proposed action may have a significant effect on the environment,” an EA should be
16 prepared. 36 C.F.R. § 220.6(c). If, based on scoping, the responsible official determines “that
17 the proposed action may have a significant environmental effect,” an EIS should be prepared. *Id.*

18 82. Federal agencies are also required to “provide for extraordinary circumstances,”
19 which are circumstances “in which a normally excluded action may have a significant
20 environmental impact.” 40 C.F.R. § 1508.4. To comply with NEPA when evaluating a
21 particular project for categorical exclusion, an agency must first determine whether the proposed
22 action falls within a categorical exclusion and then determine whether “extraordinary
23 circumstances” exist that would prevent application of the exclusion. *Id.*

24 83. In providing for “extraordinary circumstances” sufficient to preclude use of its
25 categorical exclusions, the Forest Service has determined that:

26 Resource considerations that should be considered in determining
27 whether extraordinary circumstances related to a proposed action
28 warrant further analysis and documentation in an EA or an EIS
[including]: (i) Federally listed threatened or endangered species or
designated critical habitat, species proposed for Federal listing or
proposed critical habitat, or Forest Service sensitive species;....

36 C.F.R. § 220.6(b)(1) (among others).

84. “When an agency decides to proceed with an action in the absence of an EA or
EIS, the agency must adequately explain its decision.” *Alaska Ctr. for Env’t v. U.S. Forest Serv.*,

1 189 F.3d 851, 859 (9th Cir. 1999). If the agency asserts that an activity will have an insignificant
2 effect on the environment, the agency “ ‘must supply a convincing statement of reasons why
3 potential effects are insignificant.’ ” *Id.* (quoting *The Steamboaters v. FERC*, 759 F.2d 1382,
4 1393 (9th Cir. 1985)).

5 85. NEPA regulations also require that proposals or parts of proposals, which are
6 related to each other closely enough to be, in effect, a single course of action shall be evaluated
7 in a single impact statement. 40 C.F.R. § 1502.4(a).

8 CLAIM FOR RELIEF

9 National Environmental Policy Act (NEPA) Violations

10 86. The paragraphs above are incorporated herein by reference.

11 87. Under NEPA, federal agencies must prepare a detailed written statement known
12 as an environmental impact statement (EIS) for “major Federal actions significantly affecting the
13 quality of the human environment.” 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11.

14 88. Unless the action is categorically excluded, an agency must prepare an
15 environmental assessment (EA) to determine whether preparation of an EIS is necessary. 40
16 C.F.R. § 1501.4(a)-(c).

17 89. The Bull Run Project is a timber salvage project, which would harvest fire-
18 damaged trees from up to 3,500 acres. As such, the Project greatly exceeds the 250 acre
19 limitation of the timber salvage categorical exclusion (CE) in 36 C.F.R. § 220.6(e)(13), and
20 therefore the Forest Service was required to prepare an EA or EIS. In all past roadside hazard
21 projects, including after a fire, the Sequoia National Forest has prepared EA’s, including salvage
22 projects of much smaller size, and has even prepared an EIS for post-fire restoration and salvage
23 of only 350 acres. Instead, the Forest Service decided to limit its NEPA analysis by
24 inappropriately choosing the “timber stand and/or wildlife habitat improvement activities” CE
25 (36 C.F.R. § 220.6(e)(6)), which clearly does not fit the type of timber salvage activities
26 proposed in the Bull Run Project. And while its choice of the “[p]ost-fire rehabilitation
27 activities” CE (36 C.F.R. § 220.6(e)(11)) would have been appropriate if the project was limited
28 to the types of activities covered by that CE, the Forest Service’s failure to prepare an EA for the

1 timber salvage portion of the project violates its own regulations and NEPA.

2 90. Extraordinary circumstances preclude the use of categorical exclusions and
3 require the Forest Service to analyze environmental effects in an EA or EIS if a project is likely
4 to adversely affect a Federally listed threatened or endangered species or a Forest Service
5 sensitive species. 36 C.F.R. § 220.6(b)(1). At the very least, if the Forest Service decides to
6 proceed with an action in the absence of an EA or EIS, it must adequately explain its decision
7 and must supply a convincing statement of reasons why potential effects are insignificant.
8 *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999).

9 91. Here, the U.S. Fish and Wildlife Service and the Forest Service both found that
10 the proposed tree felling and logging “may affect and is likely to adversely affect” the
11 endangered mountain yellow-legged frog (MYLF). In fact, the Forest Service admits that project
12 actions have the potential to adversely impact individual MYLFs (crush, injure, or trap) if they
13 are present during operations. Yet the Forest Service fails to supply any reasons for why the
14 potential effects from the project, which are likely to kill endangered MYLFs, are insignificant.
15 Moreover, it fails to explain or supply a convincing statement why this does not constitute an
16 extraordinary circumstance, which would preclude the use of categorical exclusions.

17 92. With respect to the Pacific fisher, a sensitive species, the Forest Service fails to
18 explain, when it already disclosed potential significant concerns about fisher habitat connectivity
19 in its decision to re-analyze its Rancheria Project due to the Cedar Fire, why the additional
20 exacerbation of habitat connectivity effects from logging in the Bull Run and Spear Creek
21 Project areas are insignificant. Moreover, it fails to explain or supply a convincing statement
22 why this does not constitute an extraordinary circumstance, which would preclude the use of
23 categorical exclusions.

24 93. And with respect to the California spotted owl, a sensitive species, the Forest
25 Service fails to explain, given the new evidence that logging levels as low as 5-25% within a
26 1500-meter radius of territory centers causes severe adverse impacts on owl occupancy, why
27 timber salvage activities within the California spotted owl territories in the Bull Run and Spear
28 Creek Project areas are insignificant. Moreover, it fails to explain or supply a convincing

1 statement why this does not constitute an extraordinary circumstance, which would preclude the
2 use of categorical exclusions.

3 94. NEPA regulations also require that proposals or parts of proposals which are
4 related to each other closely enough to be, in effect, a single course of action shall be evaluated
5 in a single impact statement. 40 C.F.R. § 1502.4(a). These connected, cumulative, and similar
6 actions must be considered together to prevent an agency from dividing a project into multiple
7 actions, each of which might individually have an insignificant environmental impact, but which
8 collectively have a substantial or significant impact. *See* 40 C.F.R. § 1508.25(a). In essence, the
9 Bull Run Project is related to, connected to, cumulative with, and identical to the Spear Creek
10 Project, such that the projects are a single course of action. In fact, they were originally
11 proposed as one action but then inappropriately separated, even though the Forest Service admits
12 that they could have been analyzed together as one project and in one analysis. But by
13 segmenting the hazard tree mitigation activities along connecting roads in the same fire area into
14 two different projects, the Forest Service impermissibly avoids a comprehensive analysis of the
15 impacts of its action, in violation of NEPA.

16 95. By its violations of NEPA, Defendants' actions are arbitrary, capricious, and
17 otherwise not in accordance with law, or without observance of procedure required by law,
18 within the meaning of the Administrative Procedure Act. 5 U.S.C. § 706(2). As such, the Court
19 should hold Defendants' actions as unlawful and set them aside. *Id.*

20 **REQUEST FOR RELIEF**

21 For these reasons, Plaintiff requests that the Court:

- 22 a) Declare that the Bull Run Project violates NEPA;
- 23 b) Set aside the Bull Run Project decision;
- 24 c) Compel Defendants to supplement their NEPA analysis with a combined EA or EIS for
25 the Bull Run and Spear Creek Projects, consider and prepare alternatives to the proposed
26 action, and otherwise order it to comply with NEPA before issuing a new decision;
- 27 d) Enjoin Defendants from removing felled trees and only felling imminently hazardous
28 trees along essential public travel corridors to avert public safety concerns until the

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Defendants have properly complied with NEPA;

- e) Award Plaintiffs their costs of litigation, including reasonable attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- f) Provide such other relief as the Court deems just and proper.

Respectfully submitted this 29th day of September, 2017.



René Voss
Matt Kenna, *Applicant Pro Hac Vice*

Attorneys for Plaintiffs