

1 René P. Voss (CA Bar No. 255758)
Natural Resources Law
2 15 Alderney Road
3 San Anselmo, CA 94960
Phone: (415) 446-9027
4 Email: renepvoss@gmail.com
LEAD COUNSEL
5

6 Matt Kenna (CO Bar No. 22159)
Public Interest Environmental Law
7 679 E. 2nd Ave., Suite 11B
Durango, CO 81301
8 Phone: (970) 749-9149
Email: matt@kenna.net
9 *Applicant Pro Hac Vice*

10 *Attorneys for Plaintiffs*

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

16 SEQUOIA FORESTKEEPER and EARTH
17 ISLAND INSTITUTE,

18 Plaintiffs,

19 v.

20 ANN CARLSON, in her official capacity as
the Acting Forest Supervisor of the Sequoia
21 National Forest; and the UNITED STATES
FOREST SERVICE,
22

23 Defendants.
24
25
26
27
28

No.: 1:18-at-157 (temporary)

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

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

INTRODUCTION

1
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 Spear Creek Roadside Hazard
4 Tree Mitigation Project (Spear Creek Project), which proposes to allow logging of 1,250 acres
5 along 23 miles of road in the Cedar Fire area in the Greenhorn Mountains of the Giant Sequoia
6 National Monument (GSNM). This project is directly linked to an identical proposal called the
7 Bull Run Roadside Hazard Tree Mitigation Project (Bull Run Project), which would log an
8 additional 3,500 acres along 50.2 miles of road and is located along connecting roads directly
9 adjacent to the Spear Creek Project area in the Sequoia National Forest.

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 Spear Creek 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 Spear Creek and adjacent Bull Run Project areas will significantly
19 and adversely affect resident California spotted owls and Pacific fishers, which are listed as
20 Forest Service Sensitive Species.

21 4. And while the Pacific fisher and California spotted owl are listed as Forest
22 Service “sensitive species,” whose population viability is in question and/or in decline, the Forest
23 Service has decided to forgo a detailed environmental analysis, even though the logging will
24 adversely and may significantly affect these species. Instead, the Forest Service has
25 categorically-excluded the project from a detailed analysis in an Environmental Assessment
26 (EA) or Environmental Impact Statement (EIS).

27 5. Plaintiffs seek a declaration that the Forest Service has violated the National
28 Environmental Policy Act (NEPA) by proceeding with the Spear Creek Project without the

1 necessary environmental analysis, an order setting aside the Spear Creek Project decision, and, if
2 necessary, an injunction to avert harms from project activities on sensitive wildlife and their
3 habitats in the Spear Creek Project area.

4 6. The Forest Service has violated NEPA in several ways. First, the Forest Service
5 has authorized a 1,250 acre timber salvage project using a categorical exclusion (CE), greatly
6 exceeding the 250 acre limit for CEs of this type, and instead it must prepare at least an EA.
7 Moreover, its choice of categorical exclusions for timber stand and wildlife habitat improvement,
8 post-fire rehabilitation, as well as road maintenance, do not fit the timber salvage actions
9 proposed here.

10 7. Second, the Forest Service has failed to explain, given its determination that the
11 Rancheria Project presented potentially significant concerns about Pacific fisher fragmentation
12 and habitat connectivity due to the Cedar Fire, why the additional exacerbation of fragmentation
13 and habitat connectivity effects from logging the Spear Creek and Bull Run Project areas are
14 insignificant. Also, it has failed to explain, given the new evidence that logging levels as low as
15 5-25% within a 1500-meter radius of territory centers causes severe adverse impacts on owl
16 occupancy, why timber salvage activities within occupied California spotted owl territories in the
17 Spear Creek Project areas are insignificant. In doing so, the Forest Service has failed to explain
18 or supply a convincing statement why these adverse effects to endangered and sensitive wildlife
19 species do not constitute “extraordinary circumstances,” which would preclude the use of
20 categorical exclusions and require a detailed NEPA analysis in an EA or EIS.

21 **JURISDICTION AND VENUE**

22 8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
23 question), 5 U.S.C. §§ 701 et seq. (Administrative Procedure Act) and 28 U.S.C. §§ 2201 and
24 2202 (Declaratory Judgment Act). Plaintiffs have exhausted all administrative remedies and the
25 violations of law claimed below are ripe for judicial review.

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

1 10. An actual judiciable controversy exists between the parties hereto.

2 **INTRADISTRICT VENUE**

3 11. Similarly, because a substantial part of one of the events or omissions which give
4 rise to the claims herein—the Spear Creek and Bull Run Projects—occurred in Kern and Tulare
5 Counties, assignment to the Fresno Division of this Court is proper under Civil Local Rule
6 120(d).

7 **PARTIES**

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

21 13. Plaintiff EARTH ISLAND INSTITUTE (EII) is a nonprofit corporation organized
22 under the laws of the State of California. EII is headquartered in Berkeley, California. EII’s
23 mission is to develop and support projects that counteract threats to the biological and cultural
24 diversity that sustains the environment. Through education and activism, these projects promote
25 the conservation, preservation and restoration of the earth. One of these projects is the John
26 Muir Project—whose mission is to protect all federal public forestlands from commercial
27 exploitation that undermines and compromises science-based ecological management. John
28 Muir Project offices are in San Bernardino County, California. EII is a membership organization

1 with over 15,000 members in the U.S., over 3,000 of whom use and enjoy the National Forests of
2 California for recreational, educational, aesthetic, spiritual, and other purposes. EII through its
3 John Muir Project (JMP) has a longstanding interest in protection of national forests. JMP and
4 EII members actively participate in governmental decision-making processes with respect to
5 national forest lands in California and rely on information provided through the NEPA processes
6 to increase the effectiveness of their participation. JMP and EII members include individuals
7 who regularly use and continue to use public lands within the Southern Sierra Nevada National
8 Forests, including the exact tracts of lands in the Spear Creek and Bull Run Project areas
9 proposed for logging, in particular, for scientific study, recreational enjoyment, aesthetic beauty,
10 and nature photography. These members' interests will be irreparably harmed by the planned
11 logging, as they will no longer be able to scientifically study these areas in their pre-logging
12 state, take nature photographs of the area in its pre-logging state, or enjoy the aesthetic beauty of
13 the unlogged forest habitat and its inhabitants.

14 14. This suit is brought by SFK and EII/JMP on behalf of themselves and their
15 adversely affected members and staff. Plaintiffs and their members' present and future interests
16 in and use of the Spear Creek and Bull Run Project areas are and will be directly and adversely
17 affected by the agency's impending actions. Those adverse effects include, but are not limited
18 to: (1) impacts to native plants and wildlife and their habitats within and around the Project areas
19 from logging; (2) reduction and impairment of recreation opportunities; (3) impaired aesthetic
20 value of forest lands, trails, and landscapes caused by Defendants' logging; and (4) loss of
21 scientific study and viewing opportunities with regard to wildlife in areas proposed for logging.
22 In addition, Plaintiffs and their members and staff have an interest in ensuring that Defendants
23 comply with all applicable laws, regulations, and procedures pertaining to the management of
24 national forest lands.

25 15. The Forest Service's implementation of the Spear Creek Project is in
26 contravention of the National Environmental Policy Act (NEPA). Because Defendants' actions
27 approving the Project violate the law, a favorable decision by this Court will redress the actual
28 and imminent injury to Plaintiffs. If the Forest Service were to comply with NEPA it would

1 supplement its environmental analyses and prepare Environmental Assessments (EA's) or
2 Environmental Impact Statements (EIS's) to consider the significant effects from these projects,
3 given the potential for significant effects on Pacific fishers and California spotted owls. The
4 analysis would consider additional alternatives to proposed actions and could minimize or avert
5 the harm to Plaintiffs' members that will be caused from the logging of trees and destruction of
6 wildlife habitat by the proposed actions.

7 16. Defendant ANN CARLSON is sued in her official capacity as the acting Forest
8 Supervisor of the Sequoia National Forest of the United States Forest Service. Supervisor
9 Carlson is directly responsible for forest management in the Sequoia National Forest and for
10 ensuring that all resource management decisions comply with applicable laws and regulations.
11 The Forest Supervisor signed the decision for the Spear Creek Project challenged here.

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

15 **FACTS**

16 The Spear Creek and Bull Run Projects

17 18. The Spear Creek and Bull Run Projects are directly adjacent to each other and are
18 located in the Greenhorn Mountains of the Sequoia National Forest, which is draped by mixed
19 conifer and white fir forest, and is interspersed by recovering burned, logged, and un-forested
20 areas, including chaparral. Mixed conifer and white fir forests provide essential wildlife habitat,
21 hiding cover, and core habitat for old forest-dependent wildlife, including the Pacific fisher and
22 the California spotted owl.

23 19. On August 16, 2016, the Cedar Fire began burning near Cedar Creek and burned
24 into the Greenhorn Mountains. After four weeks, the fire grew to more than 29,000 acres.

25 20. The Cedar Fire burned with mixed severity, and the unlogged forest in the Cedar
26 Fire area continues to provide essential wildlife habitat for old forest-dependent species. The fire
27 also created new forest habitat types, including complex early seral forest habitat, also known as
28 "snag forest" habitat, which, if left unlogged, serves as important habitat for small mammals and

1 birds, and essential habitat for the fire-adapted black-backed woodpecker. Recent detections
2 have found black-backed woodpeckers in the Cedar Fire area, which have been confirmed as the
3 southern-most detections of the species in the United States. Predators, including California
4 spotted owls and Pacific fishers, seek out these burned areas due to their abundance of small
5 mammal prey species.

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

10 22. In response, SFK immediately made inquires with the Forest Service about the
11 project, asking Forest Service District Ranger Eric LaPrice to answer a number of basic
12 questions about the proposal, including the proposed commercial logging in the GSNM where
13 logging is severely restricted.

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

- 17 • the news release started scoping for the project;
- 18 • the Forest Service was now thinking of preparing two separate projects: Spear
19 Creek Roadside Hazard Trees (Spear Creek Project) and Bull Run Creek
20 Roadside Hazard Trees (Bull Run Project); and
- 21 • he was “intending to prepare two environmental assessments (EA), one for each
22 project, *since we are proposing removal of excess material with a commercial*
23 *sale.*” (emphasis added).

24 24. On November 30, 2016, JMP’s Dr. Chad Hanson provided initial scoping
25 comments, which included a request to consider several alternatives, including: (a) limit hazard
26 tree felling to trees that are likely to fall and hit the road in question; (b) leave all or most felled
27 trees on the ground as large downed log habitat for wildlife; and (c) drop the roadside logging
28

1 proposed in the Giant Sequoia National Monument along roads 24S93, 24S94, 24S93A, and
2 24S93B and instead convert these segments to Maintenance Level 1 roads (meaning a
3 temporary/indefinite closure, but not necessarily a permanent closure, with a gate).

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

11 26. On December 15, 2016, JMP's Dr. Chad Hanson submitted supplemental
12 comments, which pointed out new scientific findings about the adverse effects from post-fire
13 logging on California spotted owls. His comments included a copy of a new Endangered Species
14 Act (ESA) listing petition for the California spotted owl, which had been submitted to the U.S.
15 Fish and Wildlife Service (FWS), requesting that the owl be listed as threatened or endangered.
16 In response, the FWS issued a 90 day finding that the petition presented substantial scientific or
17 commercial information indicating that the petitioned action may be warranted. Dr. Hanson also
18 pointed out that the removal of trees along the roads in Spear Creek and Bull Run degrades or
19 eliminates preferred spotted owl foraging habitat and is associated with loss of territory
20 occupancy, citing to Bond and Hanson 2014 (the California spotted owl ESA listing petition).

21 27. On December 20, 2016, SFK submitted detailed scoping comments, in which
22 SFK requested consideration of several alternatives in the proposed EAs, including (a) no action,
23 to deal only with imminent hazards as an emergency measure, which would be felled and left;
24 (b) an alternative that reduces treatments by removing various road sections from the proposal
25 and closes those roads to public access; (c) a fell and leave only alternative, especially in the
26 Monument, to leave tree boles as large down woody material, and remove only the tops, limbs,
27 and slash to avert fuel loading and fire risk, explaining that such an alternative is feasible and
28 was studied in detail as an alternative in the Piute Fire Roadside Hazard Project in another area

1 of the Sequoia National Forest; (d) an alternative that only felled trees within 150 feet from each
2 side of the roads (the traditional distance for these types of projects), instead of the proposed 300
3 feet; and (e) an alternative that combines aspects of each of the alternatives proposed above.

4 28. In its comments, SFK also pointed out that many of the Spear Creek Project
5 roadside units overlap many of the units of the old White River Project, which was permanently
6 enjoined by the U.S. District Court for the Northern District of California. *See Sierra Club v.*
7 *Bosworth*, 465 F. Supp. 2d 931, 941 (N.D. Cal. 2006) (entering a permanent injunction against
8 the “White River Project[] until a proper supplemental NEPA review has been conducted.”); *see*
9 *id.*, Judgement, Dkt. No. 217 (Oct. 11, 2006) (permanently enjoining implementation of the
10 White River Project “unless and until the Forest Service prepares a supplemental NEPA review
11 of the significant new information related to the potential effect of the timber contracts on the
12 habitat and environment of the Pacific fisher.”). Rather than prepare a supplemental NEPA
13 review for the White River Project, the Forest Service cancelled it and withdrew the decision,
14 and no Pacific fisher supplemental NEPA analysis was conducted.

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

24 30. On March 15, 2017, SFK submitted highly critical and very specific comments
25 with regard to Mr. Elliott’s changed approach to the Bull Run Project, including concerns about
26 using categorical exclusions (CEs) instead of a more rigorous Environmental Assessment (EA)
27 for a commercial timber salvage sale of such a large size (3,500 acres) when previous
28 correspondence indicated the use of an EA. SFK also documented that previous similar projects

1 in the Sequoia National Forest had used EAs, and rules limit the use of CEs for these types of
2 projects to those which are 250 acres and smaller. SFK also pointed out several significant
3 issues and concerns, including extraordinary circumstances regarding effects from logging on
4 sensitive species, including the Pacific fisher and California spotted owl.

5 31. On March 16, 2017, JMP submitted additional comments regarding the Bull Run
6 Project.

7 32. On April 12, 2017, the Forest Service issued a Supplemental Information Report
8 (SIR), and Revisions to the Fisher Biological Evaluation (BE) for the Rancheria Restoration
9 Project. The Rancheria Project is located south of the Cedar Fire area. The Rancheria revised
10 fisher BE found that “changes in vegetation caused by the Cedar fire have isolated the fisher
11 population in the southern Greenhorn Mountains. Fishers south of the Cedar Fire, including in
12 the Rancheria project area, may be at greater risk in the long-term due to this isolation.” And in
13 its Rancheria SIR, the Forest Service concluded that “habitat fragmentation and loss of
14 connectivity caused by the Cedar Fire occurred after the 2013 Fisher BE was completed. These
15 changes may be significant”

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

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

27 35. On May 24, 2017, SFK also submitted extensive and very specific comments with
28 regard to Mr. Elliott’s changed approach to the Spear Creek Project, which also served as

1 additional supplemental comments for the Bull Run Project. The comments mirror SFK’s
2 concerns in its Bull Run Project comments, requesting several alternatives, including closure of
3 certain roads not needed for public access, adverse effects to sensitive and endangered species
4 which constitute extraordinary circumstances and preclude the use of CEs, and the fact that the
5 1,250 acre project greatly exceeds the 250 acre limit of a commercial timber salvage CE. SFK’s
6 comments also pointed out the significant fisher habitat fragmentation and connectivity issues
7 identified in the Rancheria SIR.

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

13 37. On July 19, 2017, SFK submitted a supplemental comment letter, documenting
14 the detection of black-backed woodpeckers in the Cedar Fire area with photographs and location
15 information, confirming that this was now the southern-most detection of black-backed
16 woodpeckers in the United States.

17 38. Despite the many concerns expressed by SFK and JMP, on August 30, 2017,
18 Forest Supervisor Elliott issued his decision memorandum (DM) using two categories to exclude
19 the Bull Run Project from a detailed NEPA analysis in an EA or EIS, also allowing the project to
20 move forward as a timber salvage sale. Elliott later issued a Revised DM for the Bull Run
21 Project—the only change was to add the Road Maintenance CE to its list of authorizations under
22 NEPA.

23 39. On September 12, 2017, the Forest Service advertised the Bull Run Roadside
24 Hazard Timber sale in the Porterville Recorder, which offered 5.885 million board feet (5,885
25 Mbf) of saw logs for salvage. The bid prospectus for the Bull Run Timber Sale states that “This
26 is a fire salvage sale....”

27 40. On September 27, 2017, counsel for the Department of Justice informed
28 Plaintiffs’ counsel that the Forest Service had awarded the Bull Run Timber Sale contract to

1 Sierra Forest Products of Terra Bella, California.

2 41. On September 29, 2017, JMP and SFK, the same plaintiffs in this case, filed an
3 action in Federal Court in the Eastern District of California, Fresno Division (*Earth Island*
4 *Institute, et al., v. Kevin Elliott, et al.*, No.: 1:17-cv-01320-LJO-MJS), challenging the legality of
5 the Bull Run Project under NEPA.

6 42. Plaintiffs sought and the parties briefed a motion for preliminary injunction in the
7 Bull Run case; however, on November 17, 2017 the Court denied Plaintiffs' requested
8 injunction.

9 43. Even though the Forest Service's timber contractor, Sierra Forest Products (SFP),
10 was allowed to begin logging the Bull Run Project after November 17, 2017, the parties were
11 informed by SFP's counsel on January 9, 2018 that SFP had not started operations of the Bull
12 Run timber sale and did not have any plans to do so in the immediate future, explaining that SFP
13 intends to begin operations sometime in the Spring depending on the weather.

14 44. On January 9, 2018, the previous Forest Supervisor, Kevin Elliott, issued his
15 decision memorandum (DM) using three categories to exclude the Spear Creek Project from a
16 detailed NEPA analysis in an EA or EIS, also allowing the project to move forward as a timber
17 salvage sale.

18 45. On February 16, 2018, the Forest Service advertised the sale of timber from the
19 Spear Creek Project in the Porterville Recorder. The Forest Service will accept bids until 10:00
20 am on March 12, 2018 for the sale of an estimated 6.947 million board feet of saw logs from the
21 Spear Creek Project area.

22 Forest Service Sensitive Species

23 46. The Spear Creek Project area contains habitat and resident Forest Service
24 sensitive species, including Pacific fishers and California spotted owls.

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

28 48. Pacific fishers and California spotted owls are Forest Service sensitive species

1 that will be adversely affect by the Spear Creek and Bull Run Projects.

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

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

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

18 52. Estimates of the Southern Sierra fisher population range from 100 to 500
19 individual fishers, although other estimates have found only 50 to 120 reproductive adult females
20 in that same population.

21 53. The Southern Sierra Pacific fisher population is listed by the State of California as
22 a threatened species under the California Endangered Species Act. The fisher is listed by the
23 Forest Service as a “Sensitive Species.”

24 54. In 2014, the United States Fish and Wildlife Service (USFWS) proposed listing
25 the fisher under the federal Endangered Species Act (ESA). 79 Fed. Reg. 60419 (Oct. 7, 2014).
26 However, the agency decided not to list the entire West Coast Pacific fisher population under the
27 Act. 74 Fed. Reg. 22710 (April 18, 2016). The USFWS’s decision not to list the fisher has been
28 recently challenged in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, No.

1 3:16-cv-06040, Dkt. No. 1 (N.D. Cal. Oct. 19, 2016) (Complaint). Oral argument is scheduled
2 for May 8, 2018. *Id.*, Dkt. No. 54 (Sept. 27, 2017).

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

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

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

21 58. In its May 24, 2017, comments, SFK pointed to this finding and also suggested
22 that the loss of habitat connectivity from the Cedar Fire, in combination with the Spear Creek
23 and Bull Run projects, would exacerbate the potential significant consequences of fisher habitat
24 connectivity by further isolating fishers in the southern Greenhorn Mountains, and potentially
25 causing an a even greater risk of extirpation of fisher populations to the south of the Cedar Fire
26 area. SFK's fisher expert, Dr. Chad Hanson, found that the cumulative impacts from proposed
27 post-fire logging in the Cedar fire would be a likely adverse effect on habitat connectivity,
28 contributing to isolation of the fisher population in the Greenhorn Mountains south of the Cedar

1 Fire.

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

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

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

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

22 63. California spotted owls show remarkable site fidelity. Even after large fires burn
23 through their habitat, California spotted owls in the Sierras continue to persist and even thrive in
24 these burned habitat areas, so long as their habitat remains unlogged. For example, after
25 eliminating areas where post-fire logging had occurred, in areas that remained unlogged,
26 scientists found that post-fire occupancy of owl territories remained high—71% occupancy in the
27 Lake Fire (5 of 7 territories), 72% occupancy in the King Fire (13 of 18 territories), 94%
28 occupancy in the Rim fire (33 of 35 territories), 100% occupancy in the Chips Fire (9 of 9

1 territories), 36% occupancy in the Old Fire (4 of 11 territories), and 100% occupancy in the
2 McNally Fire in the Sequoia National Forest (6 of 6 territories).

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

10 65. The Spear Creek Project analysis, however, failed to consider or determine
11 whether these post-fire logging levels would cause a loss of occupancy of the owl territories in
12 the Cedar Fire area. Moreover, the analysis fails to explain why these concerns do not constitute
13 an extraordinary circumstance, which would preclude the use of a categorical exclusion and
14 instead require preparation of an EA or EIS.

15 The National Environmental Policy Act

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

21 67. To accomplish these purposes, NEPA requires all agencies of the federal
22 government to prepare a “detailed statement” that discusses the environmental impacts of, and
23 reasonable alternatives to, all “major Federal actions significantly affecting the quality of the
24 human environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an
25 environmental impact statement (“EIS”). The EIS must describe the adverse environmental
26 effects of the proposed action and alternatives to the proposed action. *Id.*

27 68. NEPA also requires that “all agencies of the Federal Government shall ... study,
28 develop, and describe appropriate alternatives to recommended courses of action in any proposal

1 which involves unresolved conflicts concerning alternative uses of available resources....” 42
2 U.S.C. § 4332(E); NEPA Section 102(2)(E); *see* 40 C.F.R. § 1507.2(d) (“This requirement of
3 section 102(2)(E) extends to all such proposals, not just the more limited scope of section
4 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.”).

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

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

20 71. To determine whether a proposed action significantly affects the environment,
21 and whether an EIS is required, the acting agency may first prepare an Environmental
22 Assessment (EA). 40 C.F.R. § 1508.9. An EA must provide sufficient evidence and analysis to
23 determine whether to prepare an EIS. *Id.* If the agency concludes that a project may have
24 significant impacts on the environment, it must prepare an EIS. 40 C.F.R. § 1501.4. If the EA
25 concludes that there are no significant impacts to the environment, the federal agency must
26 provide a detailed statement of reasons why the project’s impacts are insignificant and issue a
27 “finding of no significant impact” (FONSI). 40 C.F.R. § 1508.13.

1 72. Certain proposed actions are considered “categorically excluded” from detailed
2 NEPA analysis and do not require preparation of an EIS or an EA. *Id.* § 1508.4. The Forest
3 Service has promulgated numerous categorical exclusions, which require a project or case file
4 and decision memo to satisfy NEPA. *See* 36 C.F.R. § 220.6(e). In promulgating its CEs, the
5 Forest Service has acknowledged that “only routine actions that have no extraordinary
6 circumstances should be within categories for exclusion.” 57 Fed. Reg. 43,180 (Sept. 18, 1992).¹

7 73. The four relevant categorical exclusions in this case are:

8 (4) Repair and maintenance of roads, trails, and landline boundaries.

9 Examples include but are not limited to:

- 10 (i) Authorizing a user to grade, resurface, and clean the culverts of
11 an established NFS road;
12 (ii) Grading a road and clearing the roadside of brush without the
13 use of herbicides;
14 (iii) Resurfacing a road to its original condition;
15 (iv) Pruning vegetation and cleaning culverts along a trail and
16 grooming the surface of the trail; and
17 (v) Surveying, painting, and posting landline boundaries.

18 36 CFR 220.6(d)(4).

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

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

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

¹ *See* at 73 Fed. Reg. 43,084, 43,091 (July 24, 2008) (final rule placing CE rules from the Forest Service Handbook (FSH) to the CFR, explaining that “[t]his final rule is moving established categories and language on extraordinary circumstances from the Forest Service 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 (i) Shall be conducted consistent with Agency and
2 Departmental procedures and applicable land and resource
3 management plans;
- 4 (ii) Shall not include the use of herbicides or pesticides or the
5 construction of new permanent roads or other new
6 permanent infrastructure; and
- 7 (iii) Shall be completed within 3 years following a wildland fire.

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

- 13 (i) Harvest of a portion of a stand damaged by a wind or ice
14 event and construction of a short temporary road to access
15 the damaged trees, and
- 16 (ii) Harvest of fire-damaged trees.

17 36 C.F.R. §§ 220.6(e)(6), (11), and (13).

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

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

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

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

Resource considerations that should be considered in determining
whether extraordinary circumstances related to a proposed action
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

1 proposed critical habitat, or Forest Service sensitive species;....
2 36 C.F.R. § 220.6(b)(1) (among others).

3 78. “When an agency decides to proceed with an action in the absence of an EA or
4 EIS, the agency must adequately explain its decision.” *Alaska Ctr. for Env’t v. U.S. Forest Serv.*,
5 189 F.3d 851, 859 (9th Cir. 1999). If the agency asserts that an activity will have an insignificant
6 effect on the environment, the agency “ ‘must supply a convincing statement of reasons why
7 potential effects are insignificant.’ ” *Id.* (quoting *The Steamboaters v. FERC*, 759 F.2d 1382,
8 1393 (9th Cir. 1985)).

9 CLAIM FOR RELIEF

10 National Environmental Policy Act (NEPA) Violations

11 79. The paragraphs above are incorporated herein by reference.

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

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

18 82. The Spear Creek Project is a timber salvage project, which would harvest fire-
19 damaged trees from up to 1,250 acres. As such, the Project greatly exceeds the 250 acre
20 limitation of the timber salvage categorical exclusion (CE) in 36 C.F.R. § 220.6(e)(13), and
21 therefore the Forest Service was required to prepare an EA or EIS. In past roadside hazard
22 projects, including after a fire, the Sequoia National Forest has prepared EAs, including salvage
23 projects of much smaller size, and has even prepared an EIS for post-fire restoration and salvage
24 of only 350 acres. Here however, the Forest Service decided to limit its NEPA analysis by
25 inappropriately choosing the “repair and maintenance of roads” CE (36 C.F.R. § 220.6(d)(4) and
26 “timber stand and/or wildlife habitat improvement activities” CE (36 C.F.R. § 220.6(e)(6)),
27 which do not fit the type of timber salvage activities proposed in the Spear Creek Project. And
28 while its choice of the “[p]ost-fire rehabilitation activities” CE (36 C.F.R. § 220.6(e)(11)) would

1 have been appropriate if the project was limited to the types of activities covered by that CE, the
2 Forest Service's failure to prepare an EA for the timber salvage portion of the project violates its
3 own regulations and NEPA.

4 83. Extraordinary circumstances preclude the use of categorical exclusions and
5 require the Forest Service to analyze environmental effects in an EA or EIS if a project is likely
6 to adversely affect a federally listed threatened or endangered species or a Forest Service
7 sensitive species. 36 C.F.R. § 220.6(b)(1). At the very least, if the Forest Service decides to
8 proceed with an action in the absence of an EA or EIS, it must adequately explain its decision
9 and must supply a convincing statement of reasons why potential effects are insignificant.

10 *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999).

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

18 85. And with respect to the California spotted owl, a sensitive species, the Forest
19 Service fails to explain, given the new evidence that logging levels as low as 5-25% within a
20 1500-meter radius of territory centers causes severe adverse impacts on owl occupancy, why
21 timber salvage activities within the California spotted owl territories in the Spear Creek and Bull
22 Run Project areas are insignificant. Moreover, it fails to explain or supply a convincing
23 statement why this does not constitute an extraordinary circumstance, which would preclude the
24 use of categorical exclusions.

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

REQUEST FOR RELIEF

For these reasons, Plaintiff requests that the Court:

- a) Declare that the Spear Creek Project violates NEPA;
- b) Set aside the Spear Creek Project decision;
- c) Compel Defendants to supplement their NEPA analysis with an EA or EIS for the Spear Creek Project, consider and prepare alternatives to the proposed action, and otherwise order it to comply with NEPA before issuing a new decision;
- d) Enjoin Defendants from removing felled trees and only felling imminently hazardous trees along essential public travel corridors to avert public safety concerns until the 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 7th day of March, 2018.



René Voss
Matt Kenna, *Applicant Pro Hac Vice*

Attorneys for Plaintiffs