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

Conservation Congress, a non-profit
organization,

Plaintiff,

v.

United States Forest Service,

Defendant.

Case No.: _____

Complaint for declaratory and injunctive
relief

(National Environmental Policy Act, 42
U.S.C. §§ 4321 *et seq.*, National Forest
Management Act, 16 U.S.C. §§ 1601, *et*
seq., Administrative Procedure Act, 5 U.S.C.
§§ 701 *et seq.*)

STATEMENT OF THE CASE

1
2 1. Plaintiff challenges Defendant United States Forest Service's decision to
3 authorize the Lassen 15 Restoration Project (Lassen 15 project) through its Decision Notice
4 (DN) and Finding of No Significant Impact (FONSI) for the Lassen 15 Restoration Project
5 Environmental Assessment (EA) in the Warner Mountain Ranger District on the Modoc National
6 Forest in Modoc County, California. The Forest Service's EA and DN are arbitrary and
7 capricious under the Administrative Procedures Act (APA), 5 U.S.C. §§ 701 *et seq.*, because the
8 Lassen 15 project fails to comply with the National Environmental Policy Act (NEPA), 42
9 U.S.C. §§ 4321 *et seq.*, and the National Forest Management Act (NFMA), 16 U.S.C. §§ 1601,
10 *et. seq.*

11 2. Plaintiff also challenges Defendant United States Forest Service's decision to
12 authorize the Joseph Creek Forest Health Project (Joseph Creek project) through its Decision
13 Memo (DM) for the Categorical Exclusion (CE) in the Warner Mountain Ranger District on the
14 Modoc National Forest in Modoc County, California. The Joseph Creek project is adjacent to
15 the Lassen 15 project. The Forest Service's DM for the Joseph Creek project is arbitrary and
16 capricious.

JURISDICTION AND VENUE

17
18 3. This Court has jurisdiction under 28 U.S.C. § 1331(a) (action for declaratory and
19 injunctive relief arising under the Constitution and laws of the United States); 28 U.S.C.
20 §§ 2201, 2202 (power to issue declaratory or injunctive relief in cases of actual controversy); and
21 5 U.S.C. §§ 702-706, because (1) the action arises under the laws of the United States, (2)
22 Defendant is sued in its official capacity, and (3) there is a present and actual controversy
23 between the parties.
24

4. The actions giving rise to this Complaint took place in this District; venue is properly vested in this court pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 703.

5. An actual, justiciable controversy exists between the parties.

6. Plaintiff commented on an objected to the Lassen 15 project, and in doing so, Plaintiff exhausted all available administrative remedies. The challenged agency action is final and subject to this Court's review pursuant to 5 U.S.C. §§ 702, 704, and 706.

7. There are no administrative appeal or objection opportunities for projects that are not analyzed in an EA or EIS (i.e., for projects that are categorically excluded from NEPA). *See* 36 C.F.R. §§ 218.22, 218.23, and 218.31. All available administrative remedies have therefore been exhausted. However, Plaintiff did submit scoping comments on the Joseph Creek project. The challenged agency action is final and subject to this Court’s review pursuant to 5 U.S.C. §§ 702, 704, and 706.

PARTIES

8. Plaintiff CONSERVATION CONGRESS is a non-profit 501(c)(3) organization incorporated in the State of California, dedicated to maintaining, protecting, and restoring the native ecosystems of northern California. Conservation Congress has an organizational interest in the proper and lawful management of National Forests located in northern California, including the Modoc National Forest. Conservation Congress's members, staff, and board members participate in a wide range of wildlife viewing, bird watching, and other recreational activities in the Warner Mountain Ranger District on the Modoc National Forest, including the Warner Mountains and the Lassen 15 and Joseph Creek project areas. The interests of Conservation Congress and its members will be irreparably harmed if Defendant continues its violations of law.

1 9. Conservation Congress has members who live or work in communities located
2 near or adjacent to the Lassen 15 and Joseph Creek project areas. Its members use and enjoy the
3 Modoc National Forest and the Warner Mountains, including the Lassen 15 and Joseph Creek
4 project areas, for a variety of purposes, including but not limited to, hiking, backpacking,
5 photography, scientific study, and wildlife observation, among other recreational pursuits.
6 Plaintiff's members derive recreational, spiritual, professional, aesthetic, educational, and other
7 benefits and enjoyment from these activities.

8 10. Defendant Forest Service's implementation of the Lassen 15 and Joseph Creek
9 projects will harm and injure the interests of Plaintiff and its members by causing or threatening
10 irreversible adverse effects to the Modoc National Forest, including the project areas, and to the
11 flora and fauna therein. The Defendant Forest Service's actions would deprive Plaintiff and its
12 members of the recreational, spiritual, professional, aesthetic, educational, and other benefits
13 they presently derive from the Modoc National Forest and the project area. Additionally,
14 Defendant Forest Service's actions deny Plaintiff and its members their right to have the laws
15 implemented and enforced, and the satisfaction and peace of mind associated with witnessing the
16 enforcement of this nation's environmental protection laws.

17 11. Plaintiff and its members and supporters are adversely affected and irreparably
18 injured by Defendant Forest Service's impending implementation of the Lassen 15 and Joseph
19 Creek projects. These injuries are actual and concrete and would be redressed by the relief
20 sought herein. Plaintiff has no adequate remedy at law.

21 12. Defendant UNITED STATES FOREST SERVICE is the agency within the
22 United States Department of Agriculture charged with complying with NEPA and NFMA while
23
24

1 making management decisions on national forests, including the Lassen 15 and Joseph Creek
2 projects.

3 **FACTUAL BACKGROUND**

4 **The Modoc National Forest**

5 13. The Lassen 15 and Joseph Creek projects are contained within the Modoc
6 National Forest.

7 14. The Modoc National Forest is located in northern California.

8 **The Lassen 15 Restoration Project**

9 15. The Lassen 15 project area is located in the northern Warner Mountain Range in
10 the Modoc National Forest in Modoc County, California.

11 16. The Lassen 15 project area is located roughly 22 miles northeast of Alturas,
12 California.

13 17. The Lassen 15 project area encompasses 25,276 acres.

14 18. Grazing allotments occur over 25,224 acres of the Lassen 15 project area.

15 19. The EA states that the majority of the project area is composed of ponderosa and
16 Jeffrey pine dominated stands with scattered areas of white fir and lodgepole pine.

17 20. According to the EA, the majority a large portion of the ponderosa and Jeffrey
18 pine-dominated stands are plantations planted after a fire in the early 1940s.

19 21. The Lassen 15 project proposes to treat approximately 8,004 acres within the
20 project area. Of those 8,004 acres, 3,563 areas are mature ponderosa and Jeffery pine
21 plantations.

22 22. The EA states that the purpose and need for the Lassen 15 project includes,
23 among others, the following objectives:
24

- Increase heterogeneity within plantation stands
- Promote pine release and regeneration in native stands due to encroachment of more shade tolerant species
- Increase available sunlight to the forest floor to increase forage production
- Reduce the risk to communities from wildland fire within designated Wildland Urban Interface areas
- Promote aspen stands
- Provide for sustained output of forage and timber products to contribute to local economy

23. The DN and FONSI for Lassen 15 project selected Alternative 1. Under Alternative 1, the Forest Service proposes the following treatments based on “mechanical harvest” on approximately 7,002 acres:

- 2,079 Acres: thin from below by removing trees from the lower crown classes to favor those in the upper crown classes.
- 545 Acres: thin from below with secondary hand thinning by chainsaw or mastication for a prescribed burn
- 2,919 Acres: thin from below through a process of “variable retention thinning,” which creates an average of 0.5-acre gaps in the forest.
- 1,183 Acres: thinning throughout diameter classes by removing certain trees to favor desired trees without regard to crown position.
- 355 Acres: Remove with chainsaws or mastication non-merchantable timber of 1 to 10 inches in diameter in preparation for prescribed burning.
- 35 Acres: hand thin to reduce conifer encroachment of aspen.

24. The Project would burn through prescribed burning, approximately 6,146 acres, and could include prescribed burning or hand thinning across 7,510 acres 10 to 15 years after initial treatment.

25. The Project would increase existing fuel breaks from 128 acres by an additional 148 acres.

Joseph Creek Project

26. The Joseph Creek project area is located in the northern Warner Mountain Range in the Modoc National Forest in Modoc County, California.

27. The Joseph Creek project area is approximately 2,800 acres.

28. The Joseph Creek project proposes the following activities across the project area and within Pine and White Fir Stands, Mid Elevation Pine Stands, and Plantations:

- Thin commercial size trees with a diameter at breast height of ten inches or greater and pre-commercial size trees with diameter at breast height of less than ten inches;
- Remove harvested commercial material by whole tree yarding to designated landings and process;
- Construct temporary roads;
- Remove standing dead trees;
- Remove conifers within two hundred feet of aspen stands;
- Thin plantations; and
- Remove trees over thirty inches diameter at breast height for safety and operational reasons.

LEGAL BACKGROUND

The National Environmental Policy Act

29. The National Environmental Policy Act (NEPA) is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Congress enacted NEPA in 1969, directing all federal agencies to assess the environmental impact of the proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA’s primary goals are to ensure fully informed decision-making and to provide for public participation in environmental analyses and decision-making. 40 C.F.R. § 1500.1(b), (c). The Council on Environmental Quality (CEQ) promulgated uniform regulations implementing NEPA that are binding on all federal agencies. 40 C.F.R. §§ 1500 *et seq.*

30. NEPA is a procedural statute that requires federal agencies to take a “hard look” at the environmental consequences of its action. A hard look includes a thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms.

31. NEPA also requires that agencies adequately consider and disclose cumulative effects. Cumulative effects result from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.25(a).

The Categorical Exclusion

32. The Forest Service reached its decision to use a Categorical Exclusion by relying on a provision in the 2014 Farm Bill. Under NEPA, a proposed action can only be categorically excluded from further analysis and documentation in an EIS or EA “if there are no extraordinary circumstances related to the proposed action....” 36 C.F.R. § 220.6. As discussed in the Forest Service’s Handbook: “If the degree of potential effect [of the project] raises uncertainty over its

1 significance, then an extraordinary circumstance exists, precluding use of a categorical
2 exclusion.” Forest Service Handbook, 1909.15 31.2.

3 33. 36 C.F.R. § 220.6 further explains the types of resource conditions that should be
4 considered in determining whether the project can be categorically excluded. “The mere
5 presence of one or more of these resource conditions does not preclude use of a categorical
6 exclusion (CE). It is the existence of a cause-effect relationship between a proposed action and
7 the potential effect on these resource conditions, and if such a relationship exists, the degree of
8 the potential effect of a proposed action on these resource conditions that determines whether
9 extraordinary circumstances exist.” *Id.* “If the responsible official determines, based on
10 scoping, that it is uncertain whether the proposed action may have a significant effect on the
11 environment, prepare an EA.” *Id.*

12 **The National Forest Management Act**

13 34. The National Forest Management Act (NFMA) requires that the Forest Service
14 carry out activities on national forest lands “consistent with the land management plans.” 16
15 U.S.C. § 1604(i).

16 35. The Modoc National Forest Land Resource Management Plan and the Sierra
17 Nevada Forest Plan Amendment set forth standards and guidelines and resource conservation
18 objectives.

19 36. Each site-specific project on the Modoc National Forest, including the Lassen 15
20 project, much comply with the forest plan and amendment.

21 **The Administrative Procedure Act**

22 37. The Administrative Procedure Act (APA), provides for judicial review of final
23 agency action. 5 U.S.C. §§ 701, 706.

1 38. Under the authority of the APA, a reviewing court must hold unlawful and set
2 aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of
3 discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2).

4 **FIRST CLAIM FOR RELIEF**

5 **Forest Service Violation of NEPA and the APA**

6 **The Forest Service failed to adequately analyze and disclose the cumulative effects**
7 **of the Lassen 15 Restoration Project**

8 39. Plaintiff incorporates by reference all preceding paragraphs.

9 40. The National Environmental Policy Act (NEPA) requires federal agencies to
10 analyze and disclose the past, present, and foreseeable environmental impacts, including
11 cumulative impacts, of “major federal actions.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.7.

12 41. Cumulative effects result from the incremental impact of the action when added to
13 other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.25(a).

14 42. NEPA requires the Forest Service to disclose and consider the impacts of a
15 project before taking action.

16 43. The Lassen 15 project is a major federal action as defined by NEPA.

17 44. The project area overlaps numerous grazing allotments.

18 45. With respect to cattle grazing, Defendant Forest Service failed to adequately
19 describe the baseline conditions within the project area.

20 46. The baseline conditions provide the public with the environmental effect of the
21 no-action alternative under NEPA.

22 47. The no action alternative allows the decision-maker and the public to assess the
23 environmental effects of the proposed action and other action alternatives.

1 48. Defendant Forest Service proposed to analyze the cumulative impacts of grazing
2 in a future EA.

3 49. The Lassen 15 project's various treatments will change the access of cattle to
4 treated areas within the Lassen 15 project area.

5 50. The Lassen 15 project could increase access of cattle to upland areas.

6 51. Greater access by cattle to upland areas would decrease understory vegetation.

7 52. Treatments in riparian areas could increase cattle access.

8 53. In its discussion of ongoing and future impacts caused by grazing, the Defendant
9 Forest Service refers to Best Management Practices (BMPs); those BMPs do not appear in the
10 record.

11 54. The Defendant Forest Service fails to provide adequate site-specific analysis of
12 the ongoing impacts from grazing to riparian and upland areas.

13 55. In the Lassen EA, Defendant Forest Service failed to adequately analyze the
14 effects of the Lassen 15 project and the cumulative effect of grazing.

15 56. The Defendant Forest Service failed to adequately analyze the cumulative impacts
16 of cattle on the following species: Aspen, Goshawk, and Great Grey Owl.

17 57. Defendant Forest Service failed to adequately analyze the cumulative effects of
18 the Lassen 15 project before issuing a final decision.

19 58. Defendant Forest Service's failure to adequately disclose or analyze the
20 cumulative effects of the Lassen 15 project is arbitrary, capricious, an abuse of discretion, or
21 otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2).
22
23
24

1 59. Accordingly, the decision to proceed with the Lassen 15 project should be set
2 aside, and the Lassen 15 project EA, DN, and FONSI should be vacated or enjoined until the
3 Forest Service prepares a NEPA document that includes an adequate cumulative effects analysis.

4 60. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with this
5 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

6 **SECOND CLAIM FOR RELIEF**

7 **Forest Service Violation of NEPA, NFMA, and the APA**

8 **The Forest Service failed to take a hard look at the environmental impacts of the Lassen 15**
9 **Restoration Project**

10 61. Plaintiff incorporates by reference all preceding paragraphs.

11 62. The National Environmental Policy Act (NEPA) requires federal agencies to
12 analyze the foreseeable environmental impacts, including direct and indirect impacts, of “major
13 federal actions.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.8.

14 63. The National Forest Management Act (NFMA) requires that all projects comply
15 with the relevant Land and Resource Management Plan or forest plan. 16 U.S.C. § 1604(i).

16 64. NEPA requires the Forest Service to provide relevant and site-specific
17 information for a proposed action and its impacts.

18 65. The Forest Service failed to adequately disclose the impacts of the project or the
19 location of those impacts within the project area.

20 66. The Defendant Forest Service failed to adequately disclose and consider the
21 impacts of the project on the following species and their habitat: Aspen, American (Pine)
22 Marten, Goshawk, Great Grey Owl, Golden Eagle, Pacific tree (chorus) frog, and sensitive
23 plants.
24

67. By failing to adequately disclose and consider the project's impacts, the Forest Service fails to demonstrate compliance with the requirements of the Land Resource Management Plan and the Sierra Nevada Forest Plan Amendment for the Modoc National Forest.

68. Defendant Forest Service's failure to adequately disclose or analyze the specific location of the various logging and burning treatments and the effects of those treatments within the Lassen 15 project area is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2).

69. Accordingly, the decision to proceed with the Lassen 15 project EA, DN, and FONSI should be set aside, and the Lassen 15 project should be enjoined until the Forest Service prepares a NEPA document that takes an adequate hard look at the impacts of the project.

70. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

THIRD CLAIM FOR RELIEF

Forest Service Violation of NEPA, NFMA, and the APA

The Forest Service failed to adequately analyze and disclose the mitigation measures for the Lassen 15 Restoration Project

71. Plaintiff incorporates by reference all preceding paragraphs.

72. The National Environmental Policy Act (NEPA) requires federal agencies to analyze the foreseeable environmental impacts, including direct and indirect impacts, of “major federal actions.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.8.

73. As part of its hard look requirement, NEPA requires the Forest Service to adequately disclose and analyze the efficacy of its mitigation measures.

74. The NFMA requires that all projects comply with the relevant Land and Resource Management Plan or forest plan. 16 U.S.C. § 1604(i).

1 75. The Forest Service fails to adequately disclose or consider the effectiveness of its
2 proposed mitigation measures.

3 76. By failing to adequately analyze the Lassen 15 project's mitigation measures, the
4 Forest Service fails to take a hard look at the project and its impacts.

5 77. The Forest Service's failure to adequately disclose or consider the effectiveness of
6 its mitigation also violates NFMA because the Forest Service relies on mitigation to demonstrate
7 compliance with the requirements of the Land and Resource Management Plan and the Sierra
8 Nevada Forest Plan Amendment for the Modoc National Forest.

9 78. The Forest Service fails to comply with a number of objectives within the Sierra
10 Nevada Forest Plan Amendment.

11 79. The Sierra Nevada Forest Plan Amendment requires the Forest Service to meet
12 the following Riparian Conservation Objectives:

13 RCO # 2: "Maintain or restore: (1) the geomorphic and biological characteristics of
14 special aquatic features, including lakes, meadows, bogs, fens, wetlands, vernal pools,
15 springs; (2) streams, including in stream flows; and (3) hydrologic connectivity both
16 within and between watershed to provide for the habitat needs of aquatic-dependent
17 species."

18 RCO # 4: "Ensure that management activities, including fuels reduction actions, within
19 RCAs and CARs enhance or maintain physical biological characteristics associated with
20 aquatic- and riparian-dependent species."

21 RCO # 5: "Preserve, restore, or enhance special aquatic features such as meadows, lakes,
22 ponds, bogs, fens, and wetlands, to provide the ecological conditions and processes
23 needed to recover or enhance the viability of species that rely on these areas."

RCO # 6: “Identify and implement restoration actions to maintain, restore or enhance water quality and maintain, restore, or enhance habitat for riparian and aquatic species.”

80. Defendant Forest Service’s failure to adequately disclose or analyze the mitigation measures and the effectiveness of those measures is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2).

81. Accordingly, the decision to proceed with the Lassen 15 project EA, DN, and FONSI should be set aside, and the Lassen 15 project should be enjoined until the Forest Service prepares a NEPA document that takes an adequate hard look at the impacts of the project.

82. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

FOURTH CLAIM FOR RELIEF

Forest Service Violation of NEPA, NFMA, and the APA

The Forest Service failed to comply with the Sierra Nevada National Forest Plan Amendment for American (Pine) Marten

83. Plaintiff incorporates by reference all preceding paragraphs.

84. The National Environmental Policy Act (NEPA) requires federal agencies to analyze the foreseeable environmental impacts, including direct and indirect impacts, of “major federal actions.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.8.

85. The NFMA requires that all projects comply with the relevant Land and Resource Management Plan or forest plan. 16 U.S.C. § 1604(i).

86. The Sierra Nevada Forest Plan Amendment sets a 30-inch diameter at breast height limit for logging and thinning.

87. The Sierra Nevada Forest Plan Amendment imposes a number of requirements for Marten den sites.

1 88. The EA does not demonstrate the connection between the treatments described in
2 the EA and compliance with the standards for Marten and their habitat in the Sierra Nevada
3 Forest Plan Amendment.

4 89. Defendant Forest Service's failure to comply with the Sierra Nevada Forest Plan
5 Amendment is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
6 law under the APA, 5 U.S.C. § 706(2).

7 90. Accordingly, the decision to proceed with the Lassen 15 project EA, DN, and
8 FONSI should be set aside, and the Lassen 15 project should be enjoined until the Forest Service
9 prepares a NEPA document that takes an adequate hard look at the impacts of the project.

10 91. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with this
11 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

12 **FIFTH CLAIM FOR RELIEF**

13 **Forest Service violation of NEPA and the APA**

14 **The Forest Service violated NEPA because extraordinary circumstances exist that preclude**
15 **the use of a categorical exclusion**

16 92. Plaintiff incorporates by reference all preceding paragraphs.

17 93. Defendants have authorized the Joseph Creek Project in violation of NEPA, 42
18 U.S.C. §§ 4321, *et seq.*, and its implementing regulations.

19 94. “Extraordinary circumstances” exist that render the Joseph Creek Project
20 ineligible as a “categorical exclusion” from a sufficient NEPA analysis.

21 95. Specifically, the Joseph Creek project's proposed logging adversely affects the
22 following sensitive species and their critically important habitat: the northern goshawk and the
23 Golden eagle.
24

1 96. Logging of northern goshawk habitat raises uncertainty over the significance of
2 potential effects, which creates extraordinary circumstances and precludes the use of a
3 categorical exclusion, making an EA or an EIS necessary. 36 C.F.R. § 220.6.

4 97. In authorizing the Joseph Creek Project through a categorical exclusion,
5 Defendant has taken final agency actions that are arbitrary, capricious, or otherwise not in
6 accordance with law, or without observance of procedure required by law, within the meaning of
7 the APA. 5 U.S.C. § 706(2). Defendant's action should be held unlawful and set aside.

8 98. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with this
9 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

10 **SIXTH CLAIM FOR RELIEF**

11 **Forest Service violation of NEPA and the APA**

12 **The Forest Service violated NEPA because the Forest Service failed to adequately or**
13 **accurately evaluate and disclose the cumulative effects of the Joseph Creek Project in**
14 **relation to other projects, including the adjacent Lassen 15 Project**

15 99. Plaintiff incorporates by reference all preceding paragraphs.

16 100. “Scoping is required for all Forest Service proposed actions, including those that
17 would appear to be categorically excluded from further analysis and documentation in an EA or
18 an EIS.” 36 C.F.R. § 220.4(e)(1). During scoping the agency must consider all relevant factors,
19 consider whether there may be extraordinary circumstances related to the proposal, even though
20 the proposed action initially may appear appropriate for a categorical exclusion. *See id.*

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

102. “Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded.... Scoping is important to discover information that could point to the need for an EA or EIS versus a CE. Scoping is the means to identify the presence or absence of any extraordinary circumstances that would warrant further documentation in an EA or EIS. Scoping should also reveal any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects.” Forest Service Handbook, § 1909.15, Ch. 31.3.

103. Here, the Forest Service did not adequately or accurately identify cumulative effects from adjacent or overlapping projects, including the Lassen 15 project, that would indicate the project may have a significant effect on the environment, thus requiring the preparation of an EA. During scoping, the Forest Service should have been precluded from using a categorical exclusion because of the uncertainty of the project's cumulative effects.

104. In authorizing the Joseph Creek Project through a categorical exclusion, Defendant has taken final agency actions that are arbitrary, capricious, or otherwise not in accordance with law, or without observance of procedure required by law, within the meaning of the APA. 5 U.S.C. § 706(2). Defendant's action should be held unlawful and set aside.

105. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

SEVENTH CLAIM FOR RELIEF

Forest Service violation of NFMA, NEPA, and the APA

The Forest Service violated NFMA Standards and Guidelines for Minimum Proportions of Seral Stages and for Average Snag Densities

106. Plaintiff incorporates by reference all preceding paragraphs.

1 107. The NFMA requires that all projects comply with the relevant Land and Resource
2 Management Plan or forest plan. 16 U.S.C. § 1604(i). Defendants have authorized the Joseph
3 Creek Project in violation of NFMA and its implementing regulations.

4 108. A decision memo for a categorical exclusion must include findings required by
5 other laws, including findings of consistency with the Modoc National Forest Land and Resource
6 Management Plan or forest plan.

7 109. The Modoc forest plan requires that the Forest Service maintain 5% of each seral
8 stage for eastside pine, mixed conifer, white fir, red fir, and lodgepole pine on lands capable of
9 growing greater than 20 cubic feet per year and 5% in seral stages 1, 2, 3a, 4a, and 4a-older, as
10 defined by the forest plan, for each conifer and hardwood vegetation type on lands growing less
11 than 20 cubic feet per acre per year.

12 110. The Modoc forest plan requires that for suitable timber lands (>20 cu.ft./acre),
13 including ponderosa pine, white fir, mixed conifer, lodgepole pine, red fir, subalpine forest, and
14 black oak vegetation types, the Forest Service must provide for an average density of 1.2
15 snags/acre that are 15-25" DBH, 0.3 snags/acre that are >24" DBH, and 1.5 snags/acre total.

16 111. The Modoc forest plan requires that for low productive timberlands (< 20
17 cu.ft./acre), including ponderosa pine, white fir, mixed conifer, lodgepole pine, red fir, subalpine
18 forest, and black oak vegetation types, the Forest Service must provide for an average density of
19 1.2 snags/acre that are 15-24" per acre, 0.3 snags/acre that are >24' DBH, and 1.5 snags/acre
20 total.

21 112. The decision memo does not contain findings demonstrating consistency with the
22 above forest plan standard and the Joseph Creek project is inconsistent with the above forest plan
23 standards and guidelines.

1 113. In authorizing the Joseph Creek Project through a categorical exclusion,
2 Defendant has taken final agency actions that are arbitrary, capricious, or otherwise not in
3 accordance with law, or without observance of procedure required by law, within the meaning of
4 the APA. 5 U.S.C. § 706(2). Defendant's action should be held unlawful and set aside.

5 114. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with this
6 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

7 **PLAINTIFF'S PRAYER FOR RELIEF**

8 115. WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in
9 favor of Plaintiff and issue the following relief:

- 10 • declare that Defendant Forest Service violated NEPA and the APA;
 - 11 • declare that Defendant Forest Service violated NFMA and the APA;
 - 12 • declare that Defendant's actions as set forth in this complaint are arbitrary,
13 capricious, an abuse of discretion, are not in accordance with law and are without
14 observance of procedures required by law and therefore must be set aside
15 pursuant to the APA, 5 U.S.C. § 706(2);
 - 16 • vacate and remand the EA, DN, FONSI, and DM;
 - 17 • enjoin Defendant Forest Service from continuing and timber sale pursuant to the
18 Lassen 15 Restoration and Joseph Creek projects until Defendant has complied
19 with NEPA and NFMA;
 - 20 • award Plaintiff its reasonable attorney fees, costs, and expenses associated with
21 this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 or
22 other authority;
- 23
24

- and grant Plaintiff such additional and further relief as the Court deems just and equitable.

Respectfully submitted this 8th day of June 2018,

/s/ Andrew G. Ogden
ANDREW G. OGDEN

/s/ Andrew F. Mulkey
ANDRFEW F. MULKEY
Pro Hac Vice Application Pending

/s/ Sean T. Malone
SEAN T. MALONE
Pro Hac Vice Application Pending

Attorneys for Plaintiff

CIVIL COVER SHEET

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The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Conservation Congress, a non-profit organization

(b) County of Residence of First Listed Plaintiff **Butte County, CA**
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Andrew G. Ogden, PO Box 3673, Boulder, CO 80307, (303) 818-9422
Sean Malone, 259 E 5th Ave., Ste. 200-C, Eugene, OR 97401, (303) 859-0403
Andrew Mulkey, PO Box 11721, Eugene, OR 97440, (208) 596-3235

DEFENDANTS

United States Forest Service

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)
United States Department of Justice

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. §§ 4321 et seq. (NEPA); 16 U.S.C. 1601 et seq. (NFMA); 5 U.S.C. 701 et seq. (APA).

Brief description of cause:

Decisions by the U.S. Forest Service violate Nat'l Env'tl Policy Act, the Nat'l Forest Mgm't Act, and the APA

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

6/8/18

SIGNATURE OF ATTORNEY OF RECORD

/s/ Andrew Ogden

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE