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

15 CONSERVATION CONGRESS, a) Case No.: _____
16 non-profit organization,)
17 Plaintiff,) **COMPLAINT FOR DECLARATORY**
18 vs.) **AND INJUNCTIVE RELIEF**
19)
20) (National Environmental Policy Act, 42
21 UNITED STATES FOREST) U.S.C. §§ 4321 *et seq.*; National Forest
22 SERVICE,) Management Act, 16 U.S.C. § 1601 *et*
23 Defendant.) *seq.*; Administrative Procedure Act, 5
24) U.S.C. § 701 *et seq.*)
25

STATEMENT OF THE CASE

1. Plaintiff is challenging Defendant United States Forest Service’s Emergency Situation Determination (ESD), its decision to authorize the Cove Fire Salvage Project (“Cove fire sale” or “the project”) Environmental Assessment

- 1 (EA), Decision Notice (DN), and Finding of No Significant Impact (FONSI)
2 on the Modoc National Forest (Modoc).
- 3 2. The Forest Service's ESD, EA, and DN/ FONSI for the Cove fire sale are
4 arbitrary and capricious under the Administrative Procedures Act, 5 U.S.C. §§
5 701 *et seq.*, and fail to comply with the National Environmental Policy Act
6 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and the National Forest Management Act
7 (NFMA), 16 U.S.C. §§ 1601, *et seq.*
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10 JURISDICTION AND VENUE

- 11 3. This court is vested with jurisdiction under 28 U.S.C. § 1331(a) (action for
12 declaratory and injunctive relief arising under the Constitution and laws of the
13 United States); 28 U.S.C. § 2201 and § 2202 (power to issue declaratory or
14 injunctive relief in cases of actual controversy); and 5 U.S.C. §§ 702-706,
15 because (1) the action arises under the laws of the United States, (2)
16 Defendant is sued in its official capacity, and (3) there is a present and actual
17 controversy between the parties.
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- 21 4. The actions giving rise to this Complaint took place in this District; thus,
22 venue is properly vested in this court pursuant to 28 U.S.C. § 1391(e) and 5
23 U.S.C. § 703.
24
- 25 5. There exists now between the parties hereto an actual, justiciable controversy.

1 6. Because the Forest Service granted an ESD, Plaintiff does not have a right of
2 administrative appeal and clearcutting large, merchantable, overstory trees and
3 clearing the ground of small trees and native shrubs will begin immediately.
4

5 **PARTIES**

6 7. Plaintiff CONSERVATION CONGRESS (Plaintiff) is a non-profit 501(c)(3)
7 organization incorporated in the state of California, dedicated to maintaining,
8 protecting, and restoring the native ecosystems of Northern California.
9

10 Plaintiff has an organizational interest in the proper and lawful management
11 of Northern California National Forests, especially the Modoc. Plaintiff's
12 members, staff, and board members participate in a wide range of wildlife
13 viewing, bird watching, and other recreational activities in the Modoc,
14 including in the project area. The interests of Plaintiff and its members will be
15 irreparably harmed if Defendant continues its violations of law.
16

17 8. Plaintiff has members who live or work in communities located near or
18 adjacent to the Cove fire sale. Its members use and enjoy the Modoc,
19 including the project area, for a variety of purposes including, but not limited
20 to, hiking, backpacking, photography, scientific study, wildlife observation,
21 hunting, and fishing. They intend to continue to do so in the future. Plaintiff's
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1 members derive recreational, spiritual, professional, aesthetic, educational,
2 and other benefits and enjoyment from these activities.

3
4 9. The Forest Service's implementation of the project will harm and injure the
5 interest of Plaintiff and its members by causing or threatening irreversible
6 adverse effects to the Modoc, including the project area, and to the wildlife
7 and other objects of interest therein. Defendant's actions would deprive
8 Plaintiff and its members of the recreational, spiritual, professional, aesthetic,
9 educational, and other benefits they presently derive from the Modoc and the
10 project area. Additionally, Defendant's actions deny Plaintiff and its members
11 their right to have laws implemented and enforced, and the satisfaction and
12 peace of mind associated with witnessing the enforcement of this nation's
13 environmental protection laws.

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17 10. Plaintiff and its members are adversely affected and irreparably injured by the
18 Defendant's impending implementation of the Cove fire sale. These injuries
19 are actual and concrete and would be redressed by the relief sought herein.
20 Plaintiff has no adequate remedy at law.

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22 11. Defendant UNITED STATES FOREST SERVICE ("Defendant" or "Forest
23 Service") is the agency within the United States Department of Agriculture
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1 charged with complying with NEPA, NFMA, the APA, and applicable
2 regulations while making management decisions on National Forests.

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4 **FACTUAL BACKGROUND**

5 ***The Modoc National Forest, Cove Fire, and Cove Fire Project***

6 12. The Cove Fire Salvage and Restoration Project is contained within the Big
7 Valley Ranger District of the Modoc National Forest, Northern California, in
8 the Eastern Sierra Nevada mountains. The Cove project area is located
9 approximately 3 miles northwest of Adin, California and is within the North
10 Adin Management Area (MA44), identified in the Modoc National Forest
11 Land and Resource Management Plan. (Modoc LRMP) The project's
12 elevation range is between 4,200 feet and 6,378 feet.

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15 13. The project area is 1,380 acres, stretching through Barber Canyon and Dutch
16 Flat Creek areas.

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18 14. Some forested areas of Dutch Flat Creek experienced low or no mortality
19 from the Cove fire. EA at 3 (Figure 2).

20
21 15. The project area has four Northern Goshawk Protected Activity Centers
22 (PACs) and associated foraging habitat, habitat for the recently delisted
23 Modoc sucker, is home to several forest sensitive and management indicator
24 species, Riparian Conservation Areas (RCAs), and contains significant
25

- 1 acreage of California Wildlife Habitat Relationship (CWHR) of 4M and 4D
2 categories. EA at 47, 49 (Tables 8-11).
- 3
4 16. Trees within the CWHR category 4 are between 11” to 23.9” in diameter at
5 breast height (DBH). EA at 49 (Tables 10, 11).
- 6 17. CWHR 4M is used to describe stands with canopy cover of 40-59% and
7 CWHR 4D describes denser stands with canopy cover greater than 60%.
- 8
9 18. The project area and fire perimeter contain very little CWHR 5M and 5D,
10 characterized by trees over 24” DBH (approximately 841 acres), making
11 CWHR categories 4M and 4D the largest and most dense forest categories in
12 the project area. *See* EA at 44 (Table 7).
- 13
14 19. The Cove Fire started on July 24, 2017 by lightning. As with all fires, it
15 resulted in a mosaic of vegetation burn severity across the entire fire area.
- 16
17 20. Within two months of the fire burning and before the surviving trees flushed
18 (producing new green needles from surviving buds a year after the fire,
19 demonstrating their innate survival strategy response to the fire), the Forest
20 Service used the Rapid Area Assessment of Vegetation Change (“RAVG”)
21 process to assess burn severity of the fire.
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- 1 21. RAVG mapping is an important initial tool, but it cannot detect flushing, tree
2 size, trees that are scorched but still alive, or distinguish trees that may not be
3 subject to decay.
4
- 5 22. The Forest Service relied on the RAVG data to support its decision on the
6 Cove fire project.
7
- 8 23. The Forest Service prepared an Environmental Assessment (EA) for a timber
9 sale to clearcut the large, merchantable overstory trees and then subsequently
10 cut the remaining smaller trees and clear native shrubs in a portion of the
11 Cove fire area. The EA contains sections on direct, indirect, and cumulative
12 impacts on wildlife and effects of the project in RCAs.
13
- 14 24. The Forest Service prepared the EA before assessing and marking whether
15 post-fire trees were “dead” or “dying” based on the Forest Service’s *Marking*
16 *Guidelines for Fire Injured Trees in California* (Report #RO-11-01) (May
17 2011) (“2011 Marking Guidelines”), or whether trees were “hazard trees”
18 based on the Forest Service’s 2011 Marking Guidelines and *Hazard Tree*
19 *Guidelines for Forest Service Facilities and Roads in the Pacific Southwest*
20 *Region* Report # RO-12-01 (2012) (“2012 Marking Guidelines”).
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- 1 25. The Forest Service’s EA for the project includes minimum diameter limits for
2 trees or snags subject to salvage logging, but it does not set a cap for
3 maximum size trees or snags the project can remove from the area for salvage.
4
- 5 26. Pit Resource Conservation District (Pit RCD) has a stewardship contract with
6 the Forest Service, developed for the Cove fire sale, but which also
7 contemplates other projects. Pit RCD was the sole bidder on the Cove fire sale
8 and bid \$5,354.25 for the entirety of 6.3 million board feet (MBF) of timber in
9 the Cove project area.
10
- 11 27. The Forest Service did not advertise the opening of a bidding process or the
12 sale of the Cove fire timber.
13
- 14 28. The Forest Service states that the 6.3MBF of timber “would result in receipts
15 of up to an estimated \$630,000.” EA at 38-39; *see also* ESD at 2. The Forest
16 Service did not explain the basis of the estimate or the meaning of “receipts”
17 or of the basis of the \$630,000 estimate.
18
- 19 29. The Forest Service must satisfy the Big Valley Federal Sustained Yield Unit
20 (BVFSYU) guidelines, which include significant local milling requirements.
21 *See* Modoc LRMP Chapter 6 App. R (unless an exception applies, “not less
22 than 80 percent of all National Forest sawtimber sold in the Unit must be
23 given primary manufacture within the Big Valley Community” and defining
24
25

1 the geographic scope of the Big Valley community). Furthermore, the mills
2 must be “established” mills. *Id.*

3
4 30. Currently Modoc County only has one small, family owned sawmill, and the
5 Forest Service does not indicate what mill will or could handle such a large
6 volume of timber, whether that mill is local, or do more than speculate that
7 new mills may at some point in the future establish themselves. EA at 39.

8
9 31. The Forest Service selected Alternative 1 of only two alternatives. Of
10 relevance, Alternative 1 proposes the following actions and goals: (a) salvage
11 harvest cutting to recover economic value of fire-killed and damaged trees; (b)
12 roadside hazard tree removal to reduce safety hazards caused by the fire along
13 high use roads; (c) fuels treatments to reduce future fuel loads and prepare
14 sites for regeneration; and (d) replanting with non-native trees in an effort to
15 reforest areas damaged by post-fire logging and shrub clearance.
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18 32. “Salvage” and “roadside” logging, and “fuels reduction” remove vital
19 biodiverse snag forest habitat by cutting trees and clearing the terrain.
20

21 a. The “salvage harvest” action will cut 982 acres of “fire-killed” and “fire
22 injured” trees. Approximately 305 acres of this cutting would occur
23 within RCAs and Stream Management Zones (SMZs), and 239 acres
24 (78 percent) of the RCA and SMZ work would be impacted using
25

1 ground-based mechanical equipment. RCA and SMZ designations
2 means that the project must comply with more stringent standards,
3 notably regarding distance or width from the water where logging can
4 occur, whether mechanical equipment may be used to cut-down or
5 masticate (grind up) trees, and snag retention.
6

7
8 b. The “roadside hazard tree removal” action will log and remove live and
9 dead trees > 15” DBH along at least two (2) maintenance level 3 roads
10 for a total of 10.5 miles covering up to 398 acres. Felling other non-
11 merchantable trees will also occur. Figure 4 of the EA, however, shows
12 more than two roads within the treatment area. The Transportation
13 Report states that 25.3 road miles are within or provide access the
14 project, and 15 miles are level 3 roads, 7.9 miles are level 2 roads, and
15 1.1 miles are level 1 roads. Transportation Report at 8. The Forest
16 Service’s EA does not disclose all these roads’ maintenance levels or
17 explain the difference between these totals.
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21 c. The “fuels treatment” action will clear the entire 1,380 acre project area
22 of logging slash, and the vast majority of small trees and native shrubs.
23 The EA also authorizes “additional” treatments “as necessary” to meet
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1 surface fuel loading objectives. The leftover material would be then
2 chopped up and burnt.

3 d. The “reforestation” action will plant up to the entire project area of
4 “moderate to high” vegetation burn with non-native trees.
5

6 33. The Forest Service plans to use water for dust abatement during the project,
7 likely including drawing water from Dutch Flat Creek, which is part of the
8 Modoc sucker habitat. The EA did not analyze water withdrawals from the
9 Dutch Flat Creek for this purpose.
10

11 34. According to the Hydrology Report at 25, App. 3, the project appears to
12 propose salvage and snag culling along nearly every tributary to Dutch Flat
13 Creek on the southwest side, and on nearly every tributary to Barber Creek.
14

15 35. Currently, the Forest Service’s proposed snag retention formula to determine
16 the number of dead trees which should be left in the RCAs and SMZs relies
17 on an average that incorporates inoperable areas. EA at 10, 47.
18

19 36. The Forest Service disclosed that within the Cove fire perimeter, other timber
20 removal activities are occurring, but the Forest Service failed to disclose or
21 analyze relevant negative impacts or effects of these actions on the Forest
22 Service’s decision. *See* EA at 31.
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- 1 37. The Modoc sucker was listed as endangered in 1985, delisted in 2014, and is
2 subject to a 2015 Post-Delisting Monitoring Plan (PDMP). Since it was listed
3 as endangered, the Modoc sucker's range has increased, and now includes the
4 Dutch Flat Creek Wildlife Area (PDMP at 2, 7) which is within the project
5 area. While the EA says the Wildlife Area will not be treated, it does not
6 adequately evaluate the project's effects on the Wildlife Area.
7
- 8 38. The Modoc sucker is also a management indicator species in the Modoc
9 LRMP. A primary threat to the Modoc sucker is habitat degradation from
10 grazing and erosion, including in the Dutch Flat Creek Wildlife Area.
11
- 12 39. The EA does not analyze the impacts of grazing on the Modoc sucker, nor
13 does it adequately identify or analyze the impacts of opening up the project
14 area to increased grazing.
15
- 16 40. Northern Goshawk is protected under the Migratory Bird Treaty Act, 16
17 U.S.C. § 701 *et seq.* and 50 C.F.R. § 10.12; a species of concern in Executive
18 Order 13186, 66 Fed. Reg. 3853 (Jan. 17, 2001); a forest sensitive species
19 (FSS); and a management indicator species (MIS) in the 2004 Sierra Nevada
20 Forest Plan (as amended) (SFNPA). The Forest Service's Northern Goshawk
21 Inventory & Monitoring Technical Guide (Gen. Tech. Report WO-71) (July
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- 1 2006) states that the Northern Goshawk is FSS and MIS, resulting in a need
2 for information on status, habitat, and population trends throughout its range.
3
4 41. The Forest Service's EA does not treat the Northern Goshawk as a MIS. *See*
5 EA at 43-44; Management Indicator Report.
6
7 42. The SNFPA and the Modoc LRMP have standards and guidelines applicable
8 to the Northern Goshawk.
9
10 43. The EA incorporated integrated design features (IDFs) # 41-44 to address
11 SNFPA Northern Goshawk guidelines in connection with the project. EA at
12 19-20.
13
14 44. Most of the Northern Goshawks found on the Big Valley Ranger District are
15 born and raised in the North Adin Management Area. Modoc LRMP Ch. 4,
16 North Adin S&G at 4-185.
17
18 45. The SNFPA S&Gs # 71-82 and IDFs # 41 - 44 emphasize the use of nest,
19 PAC, and habitat surveys to inform project activities.
20
21 46. The SNFPA requires goshawk PACs to be maintained "regardless" of
22 occupancy status. SNFPA ROD at 38, EA at 20.
23
24 47. PACs may only be removed from a network after a stand-replacing event if
25 the habitat has been rendered "unsuitable", there are no opportunities for re-
mapping PACs in proximity to affected PACs, and surveys in remaining

1 suitable habitat confirm non-occupancy. *See* SNFPA ROD at 38; Modoc
2 LRMP Ch. 4 S&G 4-26(2)(A), 4-85 to 4-91 (Raptor Management
3 Prescription).

4
5 48. There appears to be four Northern Goshawk protected activity centers (PACs)
6 within the project area. BE/BA at 59, Appendix 1. The EA only addresses
7 three PACs and does not explain why the fourth PAC was dropped from
8 discussion.
9

10 49. The BE/BA acknowledges that in the project area, “potential habitat may still
11 be present to provide nesting opportunities.” BE/BA at 17.
12

13 50. The Forest Service then concluded that despite the cutting, clearing, reducing,
14 and removal snag habitat, the project would not have a significant effect on
15 the Northern Goshawk.
16

17 51. The Forest Service acknowledged that snag and downed wood would give
18 Northern Goshawks increases in prey, but simultaneously noted that habitat
19 type that would be removed by the project. EA at 53.
20

21 52. The Forest Service concluded that displacement of Northern Goshawks would
22 be short-term and that there is “suitable goshawk habitat outside the burned
23 perimeter and within deferred areas within the fire perimeter.” EA at 55. The
24
25

1 Forest Service did not provide information on Northern Goshawk habitat or
2 PACs in areas outside of the project area.

3
4 53. The Forest Service concluded that displacement of Northern Goshawks
5 foraging in the project area “until project actions...are completed” was not a
6 significant impact. EA at 55. The Forest Service did not identify when the
7 project actions will be completed.

8
9 54. The Modoc LRMP guideline at 4-91 encourages the enhancement of prey-
10 based habitats for the Northern Goshawk.

11
12 55. The Dutch Flat Creek PAC still has approximately 100 acres of green trees.
13 The Forest Service noted the trees may not die in 2018, and although the PAC
14 has not been occupied during the last six years of surveys “potential habitat
15 may still be present to provide nesting opportunities.” EA at 53-54. No survey
16 information was provided on surveys for the other PACs.

17
18 56. SNFPA Forest-Wide Guideline # 34 states that suitability of goshawk habitat
19 can only be determined by survey. SNFPA ROD at 54. If nest or activity
20 center status is unknown, surveys must be conducted. SNFPA Northern
21 Goshawk Standards & Guideline # 76. The project’s IDFs mirror the SNFPA
22 requirements, but the Forest Service decided here that “future analysis” and
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- 1 “future surveys” will determine PAC status and goshawk presence, and the
2 PACs will be dropped or re-mapped at a later date. EA at 52-53.
- 3 57. SNFPA Northern Goshawk S&G # 71 (SNFPA at 59-60) limits fuels
4 treatments to minimize impacts to PACs, including re-mapping during project
5 planning (not implementation or post-project), and mitigating loss of nesting
6 or foraging habitat by adding acreage to the PACs of comparable quality.
- 7
8 58. SNFPA Northern Goshawk S&G # 76-77 may allow waiving or reducing
9 limited operating procedures (LOPs) if the activity is unlikely to result in
10 breeding activity disruption or topographical features will shield nests.
- 11
12 59. SNFPA Northern Goshawk S&G # 81 (SNFPA at 61) requires that forest-
13 wide, mechanical treatments may not be conducted on more than 5 percent per
14 year and 10 percent per decade in Northern Goshawk PACs within the 11
15 Sierra Nevada National Forests.
- 16
17 60. The Modoc LRMP guidelines at 4-91 discourage nests being located in areas
18 of timber activity.
- 19
20 61. From the BE/BA map showing four PACs and the treatment areas (BE/BA at
21 59, Appendix 1), and from the Forest Service map of the treatment areas (EA
22 at 11, Figure 3), the Forest Service will allow logging of approximately 20%,
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- 1 40%, and 95% (far in excess of the 5-10% limit in all three cases) of the three
2 Northern Goshawk PACs in implementing the project.
- 3 62. The Modoc LRMP has the forest-wide Northern Goshawk S&Gs to provide
4 and maintain habitat for 100 pairs (nest territories) of goshawks of at least
5 medium habitat capability. Modoc LRMP Forest S&G 4-26(D)(23)(2)(A) and
6 Objective 4-12. In the Modoc, this includes a density of at least 1 Northern
7 Goshawk territory per 18 square miles with not greater than 12 miles distance
8 in between territories. Modoc LRMP Forest Management Prescription at 4-91.
- 9 63. The Modoc LRMP North Adin Management Area Direction S&Gs instructs
10 the Forest Service to inventory and protect active goshawk nest territories
11 when necessary to meet population targets. Modoc LRMP Ch. 4, North Adin
12 S&G at 4-186.
- 13 64. The Forest Service is obligated to consider other FSS and MIS species, for
14 example the black-backed woodpecker, fringed myotis bats, and pallid bats.
- 15 65. Black-backed woodpeckers immediately begin using areas immediately after a
16 fire burns, unlike the other species that utilize post-fire habitats for nesting,
17 denning, and foraging 2 to 20 years post-fire. The Forest Service's EA noted
18 that the species is "strongly associated" with burned forests during the first
19 eight years following a fire, and it prefers medium and large snags like those
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1 found in the CWHR 4M and 4D habitat categories targeted for removal in the
2 Cove fire sale. EA at 77.

3 66. The Forest Service disclosed that it observed a black-backed woodpecker
4 post-fire, foraging on a 24” DBH fire-killed Ponderosa pine along Dutch Flat
5 Road. EA at 78.

6
7 67. The Forest Service recognized that post-fire habitat is also positive for the
8 fringed myotis and pallid bats who use large tree cavities, forage in woodlands
9 where open areas with flowers and shrubs are interspersed with mature forest
10 all of which are present in fire-created snag habitat which provides high
11 quality roosting and foraging sites. EA at 62.

12
13
14 68. The Forest Service acknowledged that implementation of Alternative 1’s
15 salvage logging will open the forest canopy, increase light to the ground and
16 increase understory vegetation (EA at 32), and thus increase forage available
17 for livestock grazing within the National Forest, as well as increase livestock
18 distribution throughout the project area. The Forest Service concluded that
19 increased grazing is a cumulative effect that will “maintain or improve” the
20 range forage resources by reducing invasive plants and maintaining a more
21 open forest canopy, and it will be a net long-term improvement to range
22 forage resources. *See* EA at 32-33, 35, 74.
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PROCEDURAL FACTS

- 1
- 2 69. On February 8, 2018 the Forest Service issued a Notice of the Proposed
- 3 Action and the Purpose, Need and Proposed Action, initiating the scoping
- 4 process for the Cove fire sale and giving the public 30 days to comment. The
- 5 Forest Service did not post the scoping letter on its website until nearly a
- 6 month later, on March 1, 2018. The Forest Service briefly extended the
- 7 comment deadline and on March 12, 2018 and Conservation Congress
- 8 submitted comments on the Cove fire sale to the Modoc National Forest.
- 9
- 10
- 11 70. On April 26, 2018, the Forest Service issued a Draft Environmental
- 12 Assessment and a request for public comments on the Cove fire sale. On May
- 13 29, 2018, Conservation Congress submitted comments on the Cove fire sale,
- 14 incorporating its March 12, 2018 comments.
- 15
- 16
- 17 71. On June 9, 2018, the Forest Supervisor, Modoc National Forest, signed a
- 18 Decision Notice and Finding of No Significant Impact for the Cove Fire
- 19 Salvage Project (“DN/FONSI”). The DN/FONSI states that “[i]mplementation
- 20 of the decision may begin immediately upon the signing of the decision.”
- 21
- 22 72. The DN/FONSI was not issued to the public at that time.
- 23
- 24 73. In June 2018, the Forest Service prepared a Final EA on the project. The Final
- 25 EA was not issued to the public at that time.

1 74. Prior to issuing the Final EA to the public, on July 5, 2018, Defendant Forest
2 Service advertised the Cove fire sale in the Modoc County Record, but the
3 Forest Service withdrew the advertisement.
4

5 75. On July 12, 2018 the Forest Service Chief signed an ESD allowing project
6 implementation to begin immediately after publication of the DN/FONSI legal
7 notice. The DN/FONSI was not publicly noticed at that time.
8

9 76. On July 20, 2018 the Forest Service sold 1,380 acres of timber to Pit RCD, the
10 sole bidder. The contract runs through March 31, 2020.
11

12 77. On July 26, 2018, the Forest Service posted the ESD, EA, and DN/FONSI on
13 its website. On the same day, the Forest Service signed a timber sale contract
14 with Pit RCD for the sale, selling 6.3 million board feet of timber for
15 \$5,354.25.
16

17 78. The Forest Service did not provide Conservation Congress with notice of the
18 ESD, DN/FONSI, or Final EA in June 2018, or on July 12 or on July 26,
19 2018.
20

21 79. On July 31, 2018 during an online search, Conservation Congress happened to
22 find these documents posted on the Modoc National Forest website.
23 Conservation Congress contacted the Forest Service several times between
24 July 31 and August 13, 2018 via email regarding the lack of notice to the
25

1 public, and seeking project implementation, advertising, bid announcements,
2 notice of sale, and seller information. On August 1, 2018, Defendant Forest
3 Service responded that the project was being implemented through a
4 stewardship agreement with Pit RCD.
5

6 80. On August 13, 2018 at 2:22 p.m. the Forest Service emailed the ESD, Final
7 EA, and the DN/FONSI to Conservation Congress.
8

9 81. Upon Conservation Congress's information and belief, the public notice of the
10 EA, DN/FONSI, ESD, and sale has yet to be published in the local newspaper.
11

12 **GENERAL STATUTORY FRAMEWORK**

13 **The National Environmental Policy Act**

14 82. The National Environmental Policy Act (NEPA) is our "basic national charter
15 for protection of the environment." 40 C.F.R. § 1500.1(a). Congress enacted
16 NEPA in 1969, directing all federal agencies to assess the environmental
17 impact of the proposed actions that significantly affect the quality of the
18 environment. 42 U.S.C. § 4332(2)(C). NEPA's primary goals are to ensure
19 fully informed decision-making and to provide for public participation in
20 environmental analyses and decision-making. 40 C.F.R. § 1500.1(b), (c).
21 Council on Environmental Quality (CEQ) regulations implementing NEPA
22 are binding on all federal agencies. 40 C.F.R. §§ 1500 *et seq.*
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1 83. Public participation in the decision-making process, public scrutiny of the
2 project, public notice of the decision, and the public's right to seek redress of
3 improper decisions are key components of NEPA. 42 U.S.C. §§ 4331 - 4332;
4 40 C.F.R. § 1500.1(b); 40 C.F.R. § 1500.2; 5 U.S.C. § 702.
5

6 84. NEPA is a procedural statute that requires agencies to take a "hard look" at
7 the environmental consequences of its actions.
8

9 85. NEPA also requires that agencies adequately consider and disclose direct and
10 indirect impacts of a project (40 C.F.R. § 1508.7), and cumulative effects (40
11 C.F.R. § 1508.8). Cumulative effects result from the incremental impact of the
12 proposed action when added to other past, present, and reasonably foreseeable
13 future actions. 40 C.F.R. § 1508.25(a).
14

15 86. NEPA requires agencies discuss mitigation measures for environmental
16 impacts of a project. Where an agency prepares an environmental assessment
17 and it discusses possible mitigation measures, an agency must provide a
18 reasonably complete discussion of such measures.
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21 87. Based on the information provided in the EA, the decision maker must
22 determine whether or not the project will have a significant impact on the
23 environment. If the decision-maker makes a finding of no significant impact
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1 (FONSI), it is it the decision-maker's burden to support the FONSI with
2 evidence from the EA.

3 **Emergency Situation Determinations**
4

5 88. An Emergency Situation Determination ("ESD") administratively allows for a
6 project to proceed "immediately" upon agency approval. ESDs need not
7 comply with pre-decisional objection procedures, and the public does not have
8 a right of administrative appeal. 36 C.F.R. § 220.7(d). Any ESD objections
9 must be filed with the court. 36 C.F.R. § 218.21(c), (d).
10

11 89. ESDs may only be used when "immediate implementation of a decision is
12 necessary to achieve one or more of the following: Relief from hazards
13 threatening human health and safety; mitigation of threats to natural resources
14 on NFS or adjacent lands; avoiding a loss of commodity value sufficient to
15 jeopardize the agency's ability to accomplish project objectives directly
16 related to resource protection or restoration." 36 C.F.R. § 218.21(b).
17

18 90. Even though ESD implementation may begin "immediately", the Forest
19 Service must still notify the public of an ESD Decision Notice. "The
20 responsible official shall notify interested and affected parties of the
21 availability of the EA, FONSI and decision notice, as soon as practicable after
22 the decision notice is signed." 36 C.F.R. § 220.7(d).
23
24
25

1 **The National Forest Management Act**

2 91. The National Forest Management Act (NFMA) requires that the Forest
3 Service carry out activities on national forest lands “consistent with the land
4 management plans.” 16 U.S.C. §1604(i). Pursuant to NFMA, the Sierra
5 Nevada National Forest developed a management plan.
6

7 92. The 2004 Sierra Nevada Forest Management Plan Amendment (SNFPA), and
8 the 1991 Modoc Land and Resources Management Plan (which the SNFPA
9 incorporated) (SNFPA ROD at 15), set forth standards and guidelines and
10 resource conservation objectives which apply to the project. Each site-specific
11 project on the Modoc National Forest, including the Cove fire sale, must
12 comply with the applicable forest plans, and their standards and conservation
13 objectives. Additionally, the Modoc LRMP contains Standards and Guidelines
14 for the North Adin Management Area.
15

16 93. NFMA forbids the Forest Service from selling trees below market value. 16
17 U.S.C. 472a(a).
18

19
20
21 **The Administrative Procedure Act**

22 94. The Administrative Procedure Act (APA) provides for judicial relief of final
23 agency action. 5 U.S.C. §§ 701, 706.
24
25

1 95. 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,
3 capricious, an abuse of discretion, or otherwise not in accordance with law. 5
4 U.S.C. § 706(2).
5

6 **FIRST CLAIM FOR RELIEF**

7 **Violations of NEPA, NFMA, and the APA**

8 **Failure to Publish Legal Notice of Environmental Assessment, and Decision**
9 **Notice/FONSI Prior to Advertising and Effectuating Sale**
10

11 96. Plaintiff incorporates by reference the preceding paragraphs.

12 97. NEPA requires public participation in the decision-making process, public
13 scrutiny of the project, public notice of the decision. 42 U.S.C. § 4331(a).
14

15 98. Under NFMA regulations, emergency situations requiring prompt removal of
16 timber require formal advertising, and such advertising may not be authorized
17 for less than seven (7) days. 36 C.F.R. § 223.81.
18

19 99. Notice of advertising must be made available to the public. 36 C.F.R. §
20 223.82.
21

22 100. In stewardship contracts, timber sale contracts must be advertised for at least
23 30 days. 36 C.F.R. § 223.302 and § 223.80.
24
25

1 101. Defendant failed to properly notify the public of the EA, DN/FONSI, and
2 Cove fire bidding and sale.

3 102. For the foregoing reasons, the Forest Service failed to demonstrate that the
4 project is consistent with NEPA, NFMA, and the APA.

5 103. Defendant's actions as described above are arbitrary, capricious, not in
6 accordance with law, and without observance of procedures required by law,
7 within the meaning of the APA, 5 U.S.C. § 706.
8

9 104. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with
10 this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.
11
12

13 **SECOND CLAIM FOR RELIEF**

14 **Forest Service Violation of 36 C.F.R. § 220.7(d) and APA**

15 **ESD Notice Was Illegally Withheld**

16 105. Plaintiff incorporates by reference the preceding paragraphs.
17

18 106. ESDs are not subject to administrative review, and implementation of an ESD
19 may begin "immediately" after notice. 36 C.F.R. § 218.21(c)(1), (d)(1).
20

21 107. Notification requirements state that the agency "shall notify interested and
22 affected parties of the availability of the EA, FONSI and decision notice as
23 soon as practicable after the decision notice is signed." 36 C.F.R. § 220.7(d).
24
25

1 108. Under non-emergency situation determination matters, notice of
2 environmental assessments documents must be provided “upon distribution”
3 and are to be posted on the internet within four (4) calendar days. 36 C.F.R. §
4 218.7(b)-(d).
5

6 109. The ESD was signed on July 12, 2018.

7 110. The ESD was posted on the Modoc Forest Service website on July 26, 2018.
8

9 111. The Forest Service emailed the ESD, DN/FONSI, and EA to Conservation
10 Congress on August 13, 2018.

11 112. Defendant failed to notify the public of the ESD “as soon as practicable after
12 the decision notice is signed.”
13

14 113. For the foregoing reasons, the Forest Service failed to demonstrate that the
15 project is consistent with 36 C.F.R. § 220.7(d) the APA.
16

17 114. Defendant’s actions as described above are arbitrary, capricious, not in
18 accordance with law, and without observance of procedures required by law,
19 within the meaning of the APA, 5 U.S.C. § 706.
20

21 115. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with
22 this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.
23

24 //

25 //

THIRD CLAIM FOR RELIEF

Forest Service Violation of 36 C.F.R. § 218.21 and the APA

ESD Criteria Are Not Satisfied

1
2
3
4
5 116. Plaintiff incorporates by reference the preceding paragraphs.

6 117. Forest Service regulations define an ESD as “A situation on National Forest
7 System (NFS) lands for which immediate implementation of a decision is
8 necessary to achieve one or more of the following: Relief from hazards
9 threatening human health and safety; mitigation of threats to natural resources
10 on NFS or adjacent lands; avoiding a loss of commodity value sufficient to
11 jeopardize the agency's ability to accomplish project objectives directly
12 related to resource protection or restoration.” 36 C.F.R. § 218.21(b).

13
14
15 118. An ESD shall be based on an examination of the relevant information. 36
16 C.F.R. § 218.21(c).

17
18 119. Defendant failed to adequately examine one or more pieces of relevant
19 information relating to safety and economic justifications for the ESD,
20 rendering its ESD unlawful, namely:

- 21
22 a. Hazard threats from trees by failing to examine tree stability, health,
23 and survival post-fire pursuant to Forest Service guidelines;
24
25

1 b. Hazard threats to humans by failing to identify road maintenance level

2 classifications within the project area;

3 c. True commodity value;

4 d. Mitigation of threats to FSS (Forest Service Sensitive species) and MIS.

5
6 120. For the foregoing reasons, the Forest Service failed to demonstrate that the
7 project is consistent with 36 C.F.R. § 218.21.

8
9 121. Defendant's actions as described above are arbitrary, capricious, not in
10 accordance with law, and without observance of procedures required by law,
11 within the meaning of the APA, 5 U.S.C. § 706.

12
13 122. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with
14 this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

15
16 **FOURTH CLAIM FOR RELIEF**

17 **Forest Service Violated NFMA and the APA**

18 **Forest Service Failed to Demonstrate Compliance with SNFPA and**
19 **Modoc LRMP Standards & Guidelines for the Northern Goshawk**

20 123. NFMA requires that all projects comply with the relevant forest plan. 16
21 U.S.C. § 1604(i).

22
23 124. SNFPA and the Modoc LRMP apply to the Modoc National Forest, and
24 contain S&Gs and Objectives for the Northern Goshawk.
25

- 1 125. The Forest Service's decision violates NFMA by implementing the project
2 without full compliance with SNFPA and Modoc LRMP S&Gs and
3 Objectives including:
4
- 5 a. Failure to conduct nesting, PAC, and habitat surveys as provided by
6 SNFPA (S&G #34) and Modoc LRMP;
 - 7
8 b. Failure to comply with SNFPA Northern Goshawk S&Gs # 71, # 76, #
9 77, and #81 by allowing logging in Goshawk PACs in violation of the
10 limited operating period and by clearly exceeding the 5-10% limit on
11 logging in Goshawk PACs;
 - 12
13 c. Failure to analyze mechanical treatments in the project and in other
14 Sierra Nevada National Forest Goshawk habitats consistent with
15 SNFPA Northern Goshawk S&G # 81 and Modoc LRMP Management
16 Directives at 4-91;
 - 17
18 d. Failure to adequately demonstrate compliance with Modoc LRMP
19 Forest S&G 4-26(D)(23)(A) (100 pairs in at least medium habitat).
20
- 21 126. The Forest Service clearly violated NFMA or failed to provide sufficient
22 evidence that its decision does not violate NFMA.
23
- 24 127. For the foregoing reasons, the Forest Service failed to demonstrate that the
25 project is consistent with NFMA, the applicable forest plans, and the APA.

1 128. Defendant’s actions as described above are arbitrary, capricious, not in
2 accordance with law, and without observance of procedures required by law,
3 within the meaning of the APA, 5 U.S.C. § 706.
4

5 129. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with
6 this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.
7

8 **FIFTH CLAIM FOR RELIEF**

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

10 **Forest Service Failed to Adequately Disclose and Consider Impacts to** 11 **Riparian Areas and Failed to Demonstrate Compliance with the** 12 **Applicable Forest Plans for Riparian Areas**

13 130. Plaintiff incorporates by reference the preceding paragraphs.

14 131. NFMA requires that all projects comply with the relevant forest plan. 16
15 U.S.C. § 1604(i).
16

17 132. SNFPA and the Modoc LRMP apply to the Modoc National Forest.

18 133. The Modoc LRMP requires the Forest Service to “maintain or improve
19 riparian-dependent resources,” which includes streamside management zones
20 (SMZs), meadows, seeps, and wetlands. Modoc LRMP, Ch. 6 App. M.
21

22 134. The Forest Service failed to demonstrate how its proposal to log within SMZs
23 complies with the Modoc LRMP requirement to maintain or improve riparian
24 dependent resources.
25

1 135. The SNFPA designates areas within 300 feet on each side of perennial streams
2 and 150 feet around seasonally flowing streams as Riparian Conservation
3 Areas (RCAs).

4
5 136. The SNFPA contains Standards & Guidelines (S&Gs) for Riparian
6 Conservation Objectives (RCOs) to address the broader aquatic riparian
7 meadow and ecosystem strategy. SNFPA ROD App. A: Management
8 Direction at 62-66.

9
10 137. The Forest Service failed to demonstrate that the project is consistent with the
11 following Riparian Conservation Objectives (RCO):

- 12
13 a. RCO # 2 (maintain or restore special aquatic features and hydrologic
14 connectivity to provide habitat for aquatic species);
15
16 b. RCO # 3 (ensure renewable supply of downed logs);
17
18 c. RCO # 4 (ensure management activities enhance or maintain physical
19 or biological characteristics for aquatic and riparian species); and
20
21 d. RCO # 5 (preserve, restore, enhance special aquatic features to provide
22 ecological conditions and processes needed to recover or enhance
23 species viability).

24 138. Each RCO has associated S&Gs. The Forest Service failed to demonstrate that
25 the Cove fire sale complies with RCO S&Gs (# 100- # 121), which violates

1 NFMA. The Forest Service specifically failed to comply with the S&Gs listed
2 below:

- 3 a. S&Gs # 102, 103, and 105 (associated with RCO # 2);
4
5 b. S&G # 108 (associated with RCO # 3);
6
7 c. S&Gs # 111, 112, 113 (associated with RCO # 4).

8 139. The Forest Service does not adequately disclose and consider seasonal streams
9 within the project area, hydrologic connections to Dutch Flat Creek, and the
10 impacts of the project on these features.

11 140. The EA fails to adequately disclose or consider the impact of extreme rain
12 events and peak snowmelt on the water quality of waters downstream from
13 seasonal streams.

14 141. The Forest Service does not adequately disclose the location of RCAs and
15 SMZs, and other aquatic features, within the project area.

16 142. The Forest Service does not disclose how it will determine which trees to cut
17 in the RCA and SMZs.

18 143. The EA does not disclose the location of the Modoc sucker's habitat in the
19 Dutch Flat Creek Wildlife Area, impacts to the area from treatment activities
20 or that project impacts may occur upstream from the Modoc sucker habitat.
21
22
23
24
25

- 1 144. The Forest Service does not adequately disclose and consider that the project
2 may increase access of livestock to RCAs and streams within the project area,
3 and the impacts livestock will have on the riparian and stream areas.
4
- 5 145. The Forest Service does not adequately consider the impacts of mechanical
6 and non-mechanical treatment in RCAs and on waters within the project area.
7
- 8 146. The Forest Service does not adequately consider the impacts of the portions of
9 the project that would allow prescribed fire and fire from pile burning to
10 spread into RCAs or special aquatic features.
11
- 12 147. The EA allows the use of existing landings within RCAs, yet the EA fails to
13 adequately disclose or consider whether the use of existing landings within
14 RCAs or their expansion, complies with the RCOs and S&Gs of the SNFPA.
15
- 16 148. The EA fails to adequately disclose or consider the direct, indirect, and
17 cumulative effects of the proposed action on seasonal streams, downstream
18 waters, and aquatic and riparian dependent species.
19
- 20 149. By failing to adequately disclose and consider the impacts of the proposed
21 project on physical and biological characteristics of riparian areas and the
22 effect of the project on aquatic and riparian dependent species, the Forest
23 Service violated NEPA and fails to demonstrate compliance with the SNFPA
24 and the Modoc LRMP, which violates NFMA and NEPA.
25

1 150. For the foregoing reasons, the Forest Service failed to demonstrate that the
2 project is consistent with NFMA, the applicable forest plans, NEPA, and the
3 APA.

4
5 151. Defendant's actions as described above are arbitrary, capricious, not in
6 accordance with law, and without observance of procedures required by law,
7 within the meaning of the APA, 5 U.S.C. § 706.
8

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

12 **SIXTH CLAIM FOR RELIEF**

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

14 **Forest Service Failed to Adequately Disclose and Consider SNFPA and** 15 **Modoc LRMP Standards and Guidelines Regarding Snag Density and** 16 **Snag Diameter**

17 153. Plaintiff incorporates by reference the preceding paragraphs.

18 154. The Forest Service failed to disclose whether and how the project complies
19 with the SNFPA S&Gs, and the Modoc LRMP S&G snag diameter and snag
20 density requirements. Where differing provisions exist between the plans, the
21 more stringent standard applies.
22

23 155. SNFPA S&G #11's snag diameter provisions require the Forest Service to
24 retain three (3) of the largest snags per acre in eastside pine and mixed conifer
25

- 1 forest types, to use snags > 15” DBH to meet that requirement, and to
2 consider potential losses of snags over time to achieve and maintain desired
3 snag retention levels.
- 4
- 5 156. The EA sets the minimum snags per acre that the project will retain by
6 referring to the largest representative diameter size class averaged across the
7 unit.
- 8
- 9 157. By failing to require the use of snags > 15” DBH to meet the SNFPA S&G #
10 11 snag diameter requirement, the Forest Service violates the SNFPA.
- 11
- 12 158. SNFPA S&G # 11 snag density requirements require the Forest Service to
13 account for expected losses of snags over time in determining whether the
14 project achieves desired snag retention levels.
- 15
- 16 159. The Modoc LRMP includes standards for snags. Modoc LRMP Ch. 4 at 4-30
17 to 4-31. The Modoc LRMP S&Gs for snags require the Forest Service to
18 “[p]rovide habitat conditions for viable populations of snag-dependent species
19 by meeting the snag requirement targets” provided in the Modoc LRMP Ch. 4
20 at 4-30.
- 21
- 22 160. The Modoc LRMP Ch. 4 at 4-30 to 4-31 provides the following S&Gs:
23
- 24 a. “Clumped dispersion of snags is desired, but no more than five snags
25 per acre may be counted for determining average snag densities.”

- 1 b. Twenty feet is the minimum height for snags.
- 2 c. “On poorly stocked stands with too few trees to meet snag
- 3 requirements, reserve green, dead, and dying trees.”
- 4
- 5 d. On “Suitable timber lands,” the average snag density requirement for
- 6 snags greater than 24” DBH, is 0.3 snags/acre.
- 7
- 8 e. On “Low Productivity Timberlands,” the average snag density
- 9 requirement for snags greater than 24” DBH is 0.5 snags/acre.
- 10
- 11 f. Green and salvage sales will provide for snag recruitment by
- 12 designation, leaving an adequate number of living and dead trees for
- 13 future snags.
- 14
- 15 g. Snag recruitment trees will be signed or otherwise designated, as on
- 16 appraisal maps and stand record cards.

17 161. The EA incorporates large snags retained within RCAs and inoperable areas
18 into its average snag density calculation.

19 162. By failing to properly account for snag losses, the Forest Service fails to
20 comply with SNFPA S&G # 11.

21 163. The Forest Service fails to disclose or consider whether Modoc LRMP S&Gs
22 for the North Adin Management Area (MA44) (Ch. 4 at S&G 4-185) currently
23
24
25

1 meet the standards and guidelines for the management area, which include,
2 among others, the following S&Gs:

- 3 a. Designate 1,325 acres of old growth in mixed conifer and 850 acres in
4 eastside pine;
5
6 b. Improve Modoc Sucker habitat in Dutch Flat Creek and improve trout
7 habitat in upper Ash Creek; and
8
9 c. Inventory and protect active goshawk nest territories necessary to meet
10 population targets.

11 164. The project failed to adequately demonstrate compliance with Modoc LRMP
12 monitoring and evaluation requirements, including Table 5-1, to mitigate the
13 impacts of the clearing and cutting work on the project area;
14

15 165. The Forest Service violates NFMA and NEPA by failing to demonstrate
16 compliance with the SNFPA, the Modoc LRMP, and the North Adin
17 Management Area S&Gs.
18

19 166. For the foregoing reasons, the Forest Service failed to demonstrate that the
20 project is consistent with NFMA, the applicable forest plans, NEPA, and the
21 APA.
22
23
24
25

1 167. Defendant’s actions as described above are arbitrary, capricious, not in
2 accordance with law, and without observance of procedures required by law,
3 within the meaning of the APA, 5 U.S.C. § 706.

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

7
8 **SEVENTH CLAIM FOR RELIEF**

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

10 **Forest Service Failed to take a Hard Look at the Cove Fire Sale Project**

11 168. Plaintiff incorporates by reference all preceding paragraphs.

12
13 169. NEPA requires federal agencies to analyze the foreseeable environmental
14 impacts, including direct and indirect effects, and cumulative impacts, of
15 “major federal actions.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.8 (effects);
16 40 C.F.R. § 1508.7 (cumulative impacts).

17
18 170. Direct effects are caused by the action and occur at the same time and place as
19 the action. 40 C.F.R. § 1508.8(a). Indirect effects are caused by the action and
20 occur later in time or are farther removed in distance but are still reasonably
21 foreseeable. 40 C.F.R. § 1508.8(b). Cumulative effects result from the
22 incremental impact of the action when added to other past, present, and
23 reasonably foreseeable actions. 40 C.F.R. § 1508.25(a).
24
25

1 171. A federal timber sale is a major federal action as defined by NEPA.

2 172. An EA must “provide sufficient evidence and analysis for determining
3 whether” the project will have a significant impact on the environment. 40
4 C.F.R. § 1508.9(a)(1).
5

6 173. An agency must take a “hard look” at a project before a decision is made.

7
8 174. In the Cove firesale, the Forest Service failed to adequately disclose and
9 analyze the project’s direct and indirect impacts and cumulative effects.

10 175. The Forest Service failed to disclose and conduct a hard look analysis with
11 respect to the following issues:
12

- 13 a. Economic justifications for the project;
- 14 b. The direct, indirect, and cumulative impacts of using 2017 RAVG data;
- 15 c. The direct, indirect, and cumulative impacts of failing to adequately
16 implement the 2011 and 2012 Marking Guidelines prior to reaching a
17 decision on the project, and possibly before implementing the project;
- 18 d. Direct, indirect, and cumulative effects of the project on the Modoc
19 sucker and its habitat;
- 20 e. Direct and indirect effects and cumulative impacts of the project on the
21 Northern Goshawk’s nesting, foraging, PAC use, and habitat in the
22 project area and in areas relevant through guidelines;
23
24
25

- 1 f. Disclosure and analysis of direct and indirect effects and cumulative
- 2 impacts of the project on the post-fire habitat of the forest for FSS and
- 3 MIS species such as the black-backed woodpecker and bats;
- 4
- 5 g. Direct and indirect effects of the project on riparian areas;
- 6
- 7 h. Direct and indirect effects of water withdrawal and water use of the
- 8 project from the Dutch Flat Creek for dust abatement during project
- 9 implementation;
- 10 i. Indirect and cumulative effects of livestock grazing and expansion in
- 11 the project area, particularly effects on FSS, MIS, and in riparian areas;
- 12
- 13 j. Disclosure of road maintenance level classifications for all roads in the
- 14 project area;
- 15
- 16 k. Impacts and effects of road construction; and
- 17
- 18 l. Cumulative impacts of other timber sales occurring around, adjacent to,
- 19 and in close proximity to the project area, how these relate to the Forest
- 20 Service's decision.

21 176. For the foregoing reasons, the Forest Service failed to demonstrate that the
22 project is consistent with NEPA and the APA.
23
24
25

1 177. Defendant's actions as described above are arbitrary, capricious, not in
2 accordance with law, and without observance of procedures required by law,
3 within the meaning of the APA, 5 U.S.C. § 706.
4

5 178. Accordingly, the decision to proceed should be set aside, and the project
6 should be enjoined until Defendant prepares a NEPA document that includes
7 adequate direct and indirect impacts, and cumulative effects, analyses.
8

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

12 **EIGHTH CLAIM FOR RELIEF**

13 **Violation of NFMA, NEPA, and the APA**

14 **Failure to Assess and Mark Each Fire-Injured and Hazard Tree** 15 **Pursuant to Guidelines**

16 180. Plaintiff incorporates by reference the preceding paragraphs.
17

18 181. NFMA requires that all projects comply with the relevant forest plan. 16
19 U.S.C. § 1604(i).

20 182. NEPA requires agencies to justify their decisions, to rely on accurate scientific
21 analysis, and to make decisions that protect, restore, and enhance the
22 environment. 42 U.S.C. § 4332; 40 C.F.R. § 1500.1.
23
24
25

1 183. The Modoc LRMP Timber Management Direction guidelines only allow for
2 trees killed by fire to be logged if they are in stands 5 acres or larger, and if
3 75% or more of the standing trees have been killed. Modoc LRMP at 4-63.
4
5 The Forest Service failed to demonstrate compliance with this standard.

6 184. Without assessing whether the trees meet the 2011 Fire Injured Tree or the
7 2012 Hazard Tree Guidelines, the Forest Service cannot reasonably comply
8 with the Modoc LRMP, NEPA, or the APA.
9

10 185. The 2011 Fire Injured Tree Guidelines and the 2012 Hazard Tree Guidelines
11 require the Forest Service to visually assess and mark each tree that may be
12 felled under the Guidelines, and to complete a form for each tree that meets
13 the 2012 Guidelines.
14

15 186. APA requires agencies to follow their own rules, guidelines, and procedures
16 and failure to do so may be unlawful. 5 U.S.C. § 706
17

18 187. Defendant failed to assess and mark each tree for felling under the Guidelines,
19 and to do so before implementing the project.
20

21 188. Defendant failed to complete the 2012 Guideline forms for each hazard tree.
22

23 189. For the foregoing reasons, the Forest Service failed to demonstrate that the
24 project is consistent with NEPA and the APA.
25

1 190. Defendant's actions as described above are arbitrary, capricious, not in
2 accordance with law, and without observance of procedures required by law,
3 within the meaning of the APA, 5 U.S.C. § 706.
4

5 191. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with
6 this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.
7

8 **NINTH CLAIM FOR RELIEF**

9 **Violations of NFMA, NEPA, APA, and Forest Service Regulations**

10 **Failure to Disclose Timber Sale Appraisal and Failure Sell the Timber at Not** 11 **Less Than Appraised Value**

12 192. Plaintiff incorporates by reference the preceding paragraphs.
13

14 193. NFMA requires the Forest Service to sell National Forest resources at not less
15 than the appraised value. 16 U.S.C. § 472a(a).
16

17 194. The Modoc LRMP, Big Valley Federal Sustained Yield Unit Policy (Chapter
18 6, Appendix R) requires National Forest sawtimber to be offered on a
19 competitive basis and "standard Forest Service appraisal methods will be used
20 in arriving at advertised rates." Id. The policy also requires consideration of
21 "established" sawmills and their total capacity. Id.
22

23 195. NEPA requires the government to foster and promote economic requirements
24 of present and future generations of Americans. 42 U.S.C. § 4331.
25

- 1 196. An ESD under NEPA must “avoid a loss of commodity value sufficient to
2 jeopardize the agency’s ability to accomplish project objectives directly
3 related to resource protection or restoration.” 36 C.F.R. § 218.21(b).
4
- 5 197. Forest Service regulations 36 C.F.R. § 223.117(b) (sustained yield release
6 units) and 36 C.F.R. § 223.85(a) (noncompetitive sales) prohibit the agency
7 from selling any timber for less than appraised value.
8
- 9 198. The Forest Service estimates Alternative 1 would result in “receipts” of up to
10 an estimated \$630,000.
11
- 12 199. The Forest Service sold the timber rights to Pit RDC for \$5,354.25.
13
- 14 200. Defendant failed to disclose appraisal information.
15
- 16 201. The Forest Service did not explain the basis of the estimate or the meaning of
17 “receipts.”
18
- 19 202. The Forest Service’s justification for the sale relying “future” mills, instead of
20 “established” mills is arbitrary and capricious.
21
- 22 203. Defendant failed to sell the timber at not less than appraised value.
23
- 24 204. For the foregoing reasons, the Forest Service failed to demonstrate that the
25 project is consistent with NFMA, the forest plans, NEPA, and the APA.

1 205. Defendant's actions as described above are arbitrary, capricious, not in
2 accordance with law, and without observance of procedures required by law,
3 within the meaning of the APA, 5 U.S.C. § 706.
4

5 Plaintiff is entitled to its reasonable fees, costs, and expenses associated with
6 this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.
7

8 **PLAINTIFF'S PRAYER FOR RELIEF**

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

11 206. Declare that the Defendant Forest Service violated NEPA and the APA;
12

13 207. Declare that the Defendant Forest Service violated NFMA and the APA;

14 208. Declare that Defendant's actions as set forth in this Complaint are arbitrary,
15 capricious, an abuse of discretion, are not in accordance with law and are
16 without observance of procedures required by law and therefore must be set
17 aside pursuant to the APA, 5 U.S.C. § 706(2);
18

19 209. Declare that the Defendant Forest Service's Emergency Situation
20 Determination is unlawful and/or was improperly issued;
21

22 210. Enjoin Defendant Forest Service from continuing the operation of the Cove
23 fire sale until Defendant has substantiated a timber appraisal;
24

25 211. Vacate and remand the ESD, EA, DN, and FONSI to the agency;

1 212. Enjoin Defendant Forest Service from continuing the operation of the Cove
2 fire sale pursuant to the proposed project until Defendant has fully complied
3 with the legal requirements of NEPA and NFMA;
4

5 213. Award Plaintiff its reasonable fees, costs, and expenses associated with this
6 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 or
7 other authority;
8

9 214. And grant Plaintiff such additional and further relief as the Court deems just
10 and equitable.
11

12 Respectfully submitted this 31st day of August, 2018.

13 /s/ Rachel Fazio
14 RACHEL FAZIO

15 /s/ Elisabeth A. Holmes (as authorized
16 on 8/31/2018)

17 ELISABETH A. HOLMES

18 *Pro hac vice application pending*

19 Attorneys for Plaintiff
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23
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CIVIL COVER SHEET

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
(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)
(c) Attorneys (Firm Name, Address, and Telephone Number)
Rachel Fazio, P.O. Box 897, Big Bear City, CA 92314 (530) 273-9290
Elisabeth Holmes, P.O. Box 293, Eugene, OR 97440 (541) 870-7722

DEFENDANTS
United States Forest Service
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)
Unknown

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
[] 1 U.S. Government Plaintiff
[] 2 U.S. Government Defendant
[] 3 Federal Question (U.S. Government Not a Party)
[] 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)
(For Diversity Cases Only)
PTF DEF
Citizen of This State [] 1 [] 1
Citizen of Another State [] 2 [] 2
Citizen or Subject of a Foreign Country [] 3 [] 3
Incorporated or Principal Place of Business In This State [] 4 [] 4
Incorporated and Principal Place of Business In Another State [] 5 [] 5
Foreign Nation [] 6 [] 6

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

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

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 USC 4332 et seq., 5 USC 701 et seq. 16 USC 1601.
Brief description of cause:
Plaintiff challenges USFS's Cove Fire timber sale and its emergency basis for sale

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 [X] No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading 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. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box. Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.