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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

10 CONSERVATION CONGRESS and  
11 CITIZENS FOR BETTER FORESTY,

12 Plaintiffs,

13 v.

14 UNITES STATES FOREST SERVICE and the  
15 UNITED STATES FISH AND WILDLIFE  
SERVICE,

16 Defendants.

Case No.: 2:13-cv-00934-JAM-DB

AMENDED 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.*, Healthy Forests Restoration Act, 16  
U.S.C. §§ 6501 *et seq.*, Administrative  
Procedure Act, 5 U.S.C. §§ 701 *et seq.*,  
Endangered Species Act, 16 U.S.C. §§ 1531  
*et seq.*)

**STATEMENT OF THE CASE**

1  
2 1. Defendants have approved a forest management project, known as the “Pettijohn  
3 Late Successional Reserve Habitat Improvement and Fuels Reduction Project” (hereinafter  
4 “Pettijohn Project” or “the Project”). As part of the Project’s actions, Defendants plan to cut  
5 timber in an area designated as critical habitat for the Northern Spotted Owl and which is  
6 currently inhabited by several pairs of Northern Spotted Owls (“NSO” or “Spotted Owl”), a  
7 species listed under the Endangered Species Act (“ESA”). The Project is located in northern  
8 California and wholly within the Shasta-Trinity National Forest (“STNF” or “the Forest”).

9 2. Plaintiffs allege that, in approving the Pettijohn Project, Defendants have violated  
10 the ESA, the National Forest Management Act (“NFMA”), the National Environmental  
11 Policy Act (“NEPA”), the Healthy Forests Restoration Act (“HFRA”) and the regulations  
12 implementing these statutes within the meaning of the Administrative Procedure Act  
13 (“APA”).

14 3. Plaintiffs seek relief declaring Defendants’ respective approvals of the Pettijohn  
15 Project violates the ESA, NFMA, NEPA, HFRA and the APA, vacating the final decision by  
16 Defendant United States Forest Service (“USFS”) to approve and implement the Project, and  
17 enjoining Defendants from implementing the Project pending further review of the Project  
18 and compliance with all applicable provisions of such laws.

19 **JURISDICTION**

20 4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331(a) (action for declaratory  
21 and injunctive relief arising under the Constitution and laws of the United States); 28 U.S.C.  
22 §§ 2201, 2202 (power to issue declaratory or injunctive relief in cases of actual controversy);  
23 and 5 U.S.C. §§ 702-706, because (1) the action arises under the laws of the United States,

1 (2) each Defendant is sued in its official capacity, and (3) there is a present, actual and  
2 justiciable controversy between the parties.

3 5. Plaintiffs commented on and objected to the Pettijohn Project, and in doing so,  
4 Plaintiffs have exhausted all administrative remedies available to them as required by the  
5 APA. The challenged agency action is final and subject to this Court's review pursuant to 5  
6 U.S.C. §§ 702, 704, and 706.

7 6. This Court is vested with jurisdiction to enforce the provisions of the ESA or any  
8 regulation issued thereunder pursuant to Section 11(g)(1) of the ESA. 16 U.S.C. §  
9 1540(g)(1). As required by Section 11(g)(2), Plaintiff has provided Defendants with written  
10 notice of their alleged violations of the ESA at least sixty (60) days prior to the  
11 commencement of this action. 16 U.S.C. § 1540(g)(2)(A).

#### 12 **VENUE**

13 7. Venue properly rests in the Eastern District of California pursuant to 28 U.S.C.  
14 § 1391(e), 5 U.S.C. § 703 (APA), pursuant to 28 U.S.C. § 1391(e)(2) (NEPA and NFMA  
15 alleged violations), pursuant to 16 U.S.C. § 1540(g)(3)(A) (ESA alleged violations), and 16  
16 U.S.C. §6516(a) (HFRA alleged violations).

#### 17 **PARTIES**

18 8. Plaintiff CONSERVATION CONGRESS is a non-profit 501(c)(3) organization  
19 incorporated in the State of California, dedicated to maintaining, protecting, and restoring the  
20 native ecosystems of northern California. Conservation Congress has a longstanding  
21 organizational interest in the proper and lawful management of National Forests located in  
22 northern California, including the STNF. Conservation Congress also has an organizational  
23 interest in the protection of the Northern Spotted Owl. Conservation Congress's members,  
24

1 staff, and board members participate in a wide range of aesthetic, scientific, business, and  
2 recreational activities, such as hiking, fishing, hunting, photography, wildlife viewing,  
3 appreciation of scenery, and bird watching, including attempts to view and appreciate the  
4 Northern Spotted Owl in the Forest, including the specific federal lands involved in the  
5 Pettijohn Project, and have concrete plans to continue these activities. The organization's  
6 membership includes professional photography businesses and freelance photographers who  
7 earn income by photographing in northern California's National Forests, including the  
8 Forest. Conservation Congress' members, staff, and board members pursue, and have  
9 concrete plans to continue pursuing, these aesthetic, scientific business and recreational  
10 activities in the Forest, including on the lands involved in the Pettijohn Project. These  
11 intersects of Conservation Congress, its members, officers, and staff are substantial and are  
12 adversely affected by Defendants' failure to comply with the ESA, NFMA, HFRA and  
13 NEPA. The requested relief will redress the injuries of Conservation Congress and its  
14 members, staff, and board members.

15 9. Plaintiff Citizens for Better Forestry (CBF) was formed in 1985 by people living  
16 in and near the STNF to respond to the development of the new Forest Plan. CBF has  
17 approximately about 300 members. The STNF Forest Plan Final Environmental Impact  
18 Statement contains an alternative that was proposed by CBF (Alternative CBF) as one of the  
19 alternatives. CBF has continued to be involved in providing guidance to the STNF regarding  
20 the management of the forest. CBF's membership is comprised of people who rely on the  
21 STNF for recreation, jobs, and products, including the area of the Pettijohn Project, and  
22 whose interests will be adversely affected by Defendants' failure to comply with the ESA,  
23  
24

1 NFMA, HFRA and NEPA. The requested relief will redress the injuries of CBF and its  
2 members, officers, and staff.

3 10. Defendant United States Forest Service (“USFS”) is a federal agency with the  
4 U.S. Department of Agriculture. USFS is responsible for the management of the National  
5 Forests, including the STNF. As part of its management responsibility USFS must insure  
6 that activities it conducts or authorizes on the STNF comply with the ESA, NFMA, HFRA  
7 and NEPA. USFS authorized the Pettijohn Project.

8 11. Defendant United States Fish and Wildlife Service (“USFWS”) is a federal  
9 agency within the U.S. Department of the Interior. The Secretary of the Interior has  
10 delegated to the USFWS responsibility for administration and implementation of the ESA.  
11 Under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), the USFWS must engage in a  
12 process known as “consultation” with other federal agencies, such as USFS, to insure that  
13 any action authorized, funded or carried out by such agency is not likely to jeopardize the  
14 continued existence of any endangered or threatened species or result in the destruction or  
15 adverse modification of any designated critical habitat of such species. In this case, USFS  
16 engaged in consultation with USFWS concerning the Pettijohn Project.

## 17 GOVERNING LAW

### 18 The Endangered Species Act (ESA)

19 12. “As it was finally passed, the Endangered Species Act of 1973 represented the  
20 most comprehensive legislation for the preservation of endangered species ever enacted by  
21 any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

22 13. The purpose of the ESA is to “provide a means whereby the ecosystems upon  
23 which endangered species and threatened species depend may be conserved, [and] to provide  
24

1 a program for the conservation of such endangered and threatened species ....” 16 U.S.C. §  
2 1531(b).

3 14. The ESA defines conservation as “the use of all methods and procedures which  
4 are necessary to bring any endangered species or threatened species to the point at which the  
5 measures provided pursuant to [the ESA] are no longer necessary.” 16 U.S.C. § 1532(3).

6 15. A species is listed as “endangered” if it is “likely to become an endangered  
7 species within the foreseeable future throughout all or a significant portion of its range,” 16  
8 U.S.C. § 1532(6), and as “threatened” if it is “likely to become an endangered species within  
9 the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. §  
10 1532(20).

11 16. The USFWS is required to list as either threatened or endangered any species  
12 facing extinction. A species may be listed due to any one or any combination of, the  
13 following five factors: (1) the present or threatened destruction, modification, or curtailment  
14 of the species’ habitat or range; (2) overutilization for commercial, recreational, scientific, or  
15 educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory  
16 mechanisms; or (5) other natural or manmade factors affecting the species’ continued  
17 existence. 16 U.S.C. §§ 1533(a)(1)(A)-(E).

18 17. In considering the five listing factors, the USFWS must employ “the best  
19 available scientific and commercial information regarding a species’ status, without reference  
20 to possible economic or other impacts of such determination.” 50 C.F.R. § 424.11(b).

21 18. Because the objective of the ESA is to enable listed species not merely to survive,  
22 but also to recover from their threatened or endangered status, the USFWS is required to  
23 designate protected “critical habitat” for all listed species to achieve this end. 16 U.S.C. §  
24

1 1533(a)(3); *Bennett v. Spear*, 520 U.S. 154, 157-58 (1997) ("[T]he objective of the ESA is to  
2 enable listed species not merely to survive, but to recover from their endangered status. To  
3 achieve this objective, Congress required the Secretary of the Interior to designate a 'critical  
4 habitat' for all listed species.").

5 19. Critical habitat is defined as:

6 "(a) the specific areas within the geographic area occupied by the species, at the time  
7 it is listed in accordance with the [ESA], on which are found those physical or  
8 biological features (I) essential to the conservation of the species and (II) which may  
9 require special management considerations or protection; and

10 (b) specific areas outside the geographic area occupied by the species at the time it is  
11 listed in accordance with the [ESA], upon a determination by the Secretary that such  
12 areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A).

13 20. As in listing decisions, in decisions to designate critical habitat, the USFWS must  
14 make its decision "on the basis of the best scientific data available," but, unlike listing  
15 decisions, in designating critical habitat USFWS must also consider "the economic impact,  
16 and any other relevant impact of specifying any particular area as critical habitat." 16 U.S.C.  
17 § 1533(b)(2).

18 21. In order to encourage the recovery of listed species, Section 4(f) of the ESA  
19 requires the USFWS to "develop and implement [recovery] plans for the conservation and  
20 survival of [all listed] endangered species and threatened species . . . unless [it] finds that  
21 such a plan will not promote the conservation of the species," including "a description of  
22 such site-specific management actions as may be necessary to achieve the plan's goal." 16  
23 U.S.C. § 1533(f).

24 22. Section 7 of the ESA requires defendant USFS, in consultation with defendant  
USFWS, to insure that any action authorized, funded, or carried out by the USFS is not likely  
to (1) jeopardize the continued existence of any endangered species or threatened species

1 (whether or not critical habitat has been designated), or (2) result in the destruction or  
2 adverse modification of designated critical habitat of such species. 16 U.S.C. § 1536(a)(2).

3 23. Section 7 of the ESA mandates that all Federal agencies involved in the  
4 consultation process must “use the best scientific and commercial data available” in fulfilling  
5 their obligations under the statute. 16 U.S.C. §§ 1536(a)(2), 1536(c)(1). The “best available  
6 scientific and commercial data” standard requires that a Federal agency must consider all  
7 available information. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581,  
8 602 (9th Cir. 2014).

9 24. To comply with ESA Section 7(a)(2), an action agency, such as the USFS in the  
10 present case, generally must prepare a document called a “biological assessment” (“BA”). 16  
11 U.S.C. § 1536(c)(1).

12 25. The BA informs the action agency in its initial determination whether any listed  
13 species or critical habitat is likely to be affected by the proposed action, 16 U.S.C. §  
14 1536(c)(1); 50 C.F.R. § 402.12(a). If the proposed agency action may affect a listed species  
15 or critical habitat, the action agency must engage in “formal consultation” with the USFWS.  
16 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

17 26. If the action agency and the USFWS engage in formal consultation, then the  
18 USFWS prepares a document known as a biological opinion (“BO”) to evaluate whether the  
19 proposed action is likely to jeopardize the continued existence of a listed species or adversely  
20 modify its critical habitat. 50 C.F.R. § 402.14(a).

21 27. The BO must be based on the “best scientific and commercial data available,” 16  
22 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d), must include a summary of the information on  
23 which it is based and must adequately detail and assess how the proposed action affects listed  
24



1 species and their critical habitats, 50 C.F.R. § 402.14(h), and must also include an evaluation  
2 of the “cumulative effects on the listed species or critical habitat.” 50 C.F.R. § 402.14(g)(3).

3 28. In the BO, the USFWS must provide its opinion whether the proposed action  
4 “will jeopardize the continued existence” of a listed species, or result in the destruction or  
5 “adverse modification” of designated critical habitat (a “jeopardy opinion”). If the USFWS  
6 issues a jeopardy opinion, then the BO must include “reasonable and prudent alternatives,” if  
7 any. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(2).

8 29. Either the action agency or the USFWS must “reinitiate” consultation “If new  
9 information reveals effects of the action that may affect listed species or critical habitat in a  
10 manner or to an extent not previously considered,” 50 C.F.R. § 402.16(b), or “[i]f a new  
11 species is listed or critical habitat designated that may be affected by the identified action.”  
12 50 C.F.R. § 402.16(d).

13 30. The ESA prohibits “take” of species that are listed as endangered. 16 U.S.C. §  
14 1538(1)(B). The USFWS has extended the “take” prohibition to threatened species through  
15 regulation. 50 C.F.R. § 17.31(a).

16 31. “Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or  
17 collect, or attempt to engage in any such conduct. 16 U.S.C. § 1532(19). The terms “harass”  
18 and “harm” are further defined in the ESA’s implementing regulations. “Harass” means an  
19 intentional or negligent act or omission which creates the likelihood of injury to wildlife by  
20 annoying it to such an extent as to significantly disrupt normal behavioral patterns which  
21 include, but are not limited to, breeding, feeding, or sheltering. “Harm” means an act which  
22 actually kills or injures wildlife. Such act may include significant habitat modification or  
23

1 degradation where it actually kills or injures wildlife by significantly impairing essential  
2 behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3.

3 32. If a BO concludes that the action is not likely to jeopardize the continued  
4 existence of a listed species, and will not result in the destruction or adverse modification of  
5 the designated critical habitat of a species, but will result in the incidental take of a protected  
6 species, the BO must provide an “incidental take statement” (“ITS”) specifying the amount  
7 or extent of such incidental taking on the listed species, and any “reasonable and prudent  
8 measures” that the USFWS considers necessary or appropriate to minimize such impact, and  
9 setting forth the “terms and conditions” that must be complied with by the action agency, in  
10 this case USFS, to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

11 33. Without a BO and an ITS from the USFWS, the USFS is not authorized to “take”  
12 any listed species, nor may it jeopardize the species or adversely modify its critical habitat.

13 34. The regulatory definition of “destruction or adverse modification” of critical  
14 habitat is “a direct or indirect alteration that appreciably diminishes the value of critical  
15 habitat for the conservation of a listed species. Such alterations may include, but are not  
16 limited to, those that alter the physical or biological features essential to the conservation of a  
17 species or that preclude or significantly delay development of such features.” 50 C.F.R. §  
18 402.02 (Revised Feb. 1, 2016).

19 35. In evaluating the potential for a proposed action to adversely modify critical  
20 habitat, FWS must consider effects on either the survival or the recovery of the listed species.  
21 *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069-70 (9th  
22 Cir. 2004), *amended by* 387 F.3d 968 (9th Cir. 2004). Therefore, a key part of the critical  
23  
24

1 habitat analysis process is how the proposed action may affect recovery of the listed species,  
2 for example, by delaying recovery or making recovery less likely to occur.

3 36. Physical or biological features (“PBFs”) are those physical and biological features  
4 “that are essential to the conservation of a given species and may require special management  
5 considerations or protection.” 50 C.F.R. § 424.12(b).

6 37. An action may destroy or adversely modify critical habitat if it adversely affects  
7 the essential PBFs to an extent that the intended conservation function or purpose of critical  
8 habitat for the species is appreciably reduced. 50 C.F.R. § 402.02 (Revised Feb. 1, 2016).

9 **The National Environmental Policy Act (NEPA)**

10 38. NEPA is our "basic national charter for protection of the environment." 40 C.F.R.  
11 § 1500.1(a).

12 39. NEPA and its implementing regulations promulgated by the Council on  
13 Environmental Quality require federal agencies to prepare an environmental impact  
14 statement ("EIS") for "every recommendation or report on proposals for legislation and other  
15 major Federal actions significantly affecting the quality of the human environment." 42  
16 U.S.C. § 4332(2)(C), 40 C.F.R. § 1508.11.

17 40. NEPA has “twin aims.” First, it requires federal agencies “to consider every  
18 significant aspect of the environmental impact of a proposed action. Second, it ensures that  
19 the agency will inform the public that it has indeed considered environmental concerns in its  
20 decisionmaking process." *Kern v. BLM*, 284 F.3d 1062, 1066 (9th Cir. 2002) (*quoting*  
21 *Baltimore Gas & Electric Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983)).  
22  
23  
24

1           41. The primary purpose of a NEPA analysis "is to serve as an action-forcing device  
2 to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs  
3 and actions of the Federal Government." 40 C.F.R. § 1502.1.

4           42. "NEPA procedures must insure that environmental information is available to  
5 public officials and citizens before decisions are made and before actions are taken . . . .  
6 Accurate scientific analysis, expert agency comments, and public scrutiny are essential to  
7 implementing NEPA." 40 C.F.R. § 1500.1(b).

8           43. NEPA requires federal agencies to analyze the direct, indirect, and cumulative  
9 impacts of proposed actions. 40 C.F.R. §§ 1508.7, 1508.8.

10                           **The National Forest Management Act (NFMA)**

11           44. The NFMA requires the USFS to create a comprehensive Forest Plan for each  
12 national forest. 16 U.S.C. § 1604(a), (e); *Inland Empire Pub. Lands Council v. United States*  
13 *Forest Serv.*, 88 F.3d 754, 757 (9th Cir. 1996) (USFS first develops Forest Plan or Land  
14 Resource Management Plan consistent with requirements of NFMA); *Lands Council v.*  
15 *Powell*, 395 F.3d 1019, 1032-33 (9th Cir. 2005). A forest plan is also referred to as a Land  
16 Resource Management Plan ("LRMP").

17           45. Once the Forest Plan or LRMP is adopted, NFMA prohibits any site-specific  
18 activities that are inconsistent with the Forest Plan. *Inland Empire*, 88 F.3d at 757 ("[S]ite-  
19 specific projects must be consistent with the stage-one, forest-wide plan."); *Lands Council*,  
20 395 F.3d at 1033.

21                           **The Healthy Forests Restoration Act (HFRA)**

22           46. The HFRA was passed in December 2003 (P.L. 108-148) with the stated goal "to  
23 reduce delays and remove statutory barriers for projects on federal land that reduce  
24

1 hazardous forest fuels and improve forest health and vigor.” One the six purposes of the  
2 HFRA is “to protect, restore, and enhance forest ecosystem components to promote the  
3 recovery of threatened and endangered species, improve biological diversity, and enhance  
4 productivity and carbon sequestration.” 16 U.S.C. § 6501(6)(A) – (C).

5 47. The HFRA requires that a project “fully maintain, or contribute toward the  
6 restoration of, the structure and composition of old growth stands according to the pre-fire  
7 suppression old growth conditions characteristic of the forest type, taking into account the  
8 contribution of the stand to landscape fire adaptation and watershed health, and retaining  
9 large trees contributing to old growth structure.” 16 U.S.C. § 6512(e)(2).

10 48. The HFRA specifically includes a requirement to protect “Large” trees:

11 “Except in old growth stands where the management direction is consistent with  
12 subsection (e)(2), the Secretary shall carry out a covered project in a manner that –  
13 (A) focuses largely on small diameter trees, thinning, strategic fuel breaks, and  
14 prescribed fire to modify fire behavior, as measured by the projected reduction of  
15 uncharacteristically severe wildfire effects for the forest type (such as adverse soil  
16 impacts, tree mortality or other impacts); and (B) maximizes the retention of large  
17 trees, as appropriate for the forest type, to the extent that the trees promote fire-  
18 resilient stands.” 16 U.S.C. § 6512(f).

### 19 **The Administrative Procedure Act (APA)**

20 49. The Court’s review of plaintiffs’ NEPA, NFMA, and certain ESA claims is  
21 governed by the APA.

22 50. The APA provides “[a] person suffering legal wrong because of an agency  
23 action, or adversely affected or aggrieved by agency action within the meaning of a relevant  
24 statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

51. The APA provides “the reviewing court shall . . . hold unlawful and set aside  
agency actions, findings, and conclusions found to be . . . arbitrary, capricious, or an abuse of

1 discretion or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or which have  
2 been taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

3 **PROCEDURAL BACKGROUND**

4 52. The USFS issued the Final EIS for the Pettijohn Project in May 2012.

5 53. The USFS issued the Record of Decision for the Pettijohn Project in March 2013.

6 54. On May 12, 2013, Plaintiffs filed the complaint initiating this litigation, alleging  
7 violations of the ESA, NEPA, and the NFMA in connection with the Pettijohn Project.

8 55. On June 27, 2013, the USFS requested additional consultation with the Fish and  
9 Wildlife Service on the Pettijohn Project pursuant to Section 7 of the ESA.

10 56. On July 8, 2013, the Court stayed this case on stipulation of the parties to allow  
11 for the USFS and USFWS to complete the reinitiated Section 7 consultation process and any  
12 attendant administrative process otherwise required by law.

13 57. On May 1, 2017, the USFS issued the "March 2017 Pettijohn Project Wildlife  
14 Supplemental Information Report [ ] for the Wildlife Biological Assessment & Biological  
15 Evaluation for the Pettijohn LSR Project" ("2017 WSIR").

16 58. In April, 2018, the USFWS sent the "Supplemental Biological Opinion" ("2018  
17 SBO") to the USFS, which concluded the reinitiated formal consultation for the Pettijohn  
18 Project.

19 59. On July 9, 2018, the Court lifted the stay, according to the parties' stipulation.

20 60. On March 27, 2019, the USFS issued a Supplemental Information Report ("2019  
21 SIR") that assessed new information and changed conditions relevant to the Pettijohn Project.  
22 The 2019 SIR included modifications to the Pettijohn Project.

23 **FACTUAL ALLEGATIONS**

1 *Northern Spotted Owl*

2 61. Historically, the Northern Spotted Owl, *Strix occidentalis caurina*, (sometimes  
3 referred to as “NSO” or the “Owl”) ranged in structurally complex forests, commonly  
4 referred to as "old growth" forests, from southwest British Columbia through the Cascade  
5 Mountains and coastal ranges in Washington, Oregon and California, as far south as Marin  
6 County, California. Due to the widespread loss of Northern Spotted Owl habitat, the  
7 inadequacy of existing regulatory mechanisms to conserve the species, and its precipitous  
8 decline, the USFWS listed the Northern Spotted Owl as a threatened species under the ESA  
9 in 1990. 55 Fed. Reg. 26114 (June 26, 1990).

10 62. Today, with the continued destruction of old growth forests, the rangewide  
11 Northern Spotted Owl population is in decline as a result of decades of habitat loss and  
12 degradation and the recent expansion of barred owl populations throughout its range.

13 63. In published meta-analyses the USFWS found that the average annual rate of  
14 decline in the rangewide population of the Northern Spotted Owl increased from 2.8% in  
15 2011 to 3.8% in 2015, and the negative rate of population change for the Northern Spotted  
16 Owl in California increased significantly from 32% to 55% in the same time period.

17 64. Recent studies indicate that the Northern Spotted Owl population in northern  
18 California is declining 5.5% per year.

19 65. In response to a 2012 petition to uplist the Northern Spotted Owl from threatened  
20 to endangered status under the ESA, in April 2015 the USFWS determined that the petition  
21 presented substantial information indicating the uplisting may be warranted due to a number  
22 of listing factors. 80 F.R. 19259 - 19263.

23 *Late Successional Reserves*

1           66. The conservation strategy for the Northern Spotted Owl, established by the USFS  
2 in the 1994 Northwest Forest Plan (“NWFP”), includes the protection of large blocks of  
3 habitat to facilitate the survival of clusters of breeding Spotted Owl pairs, the distribution of  
4 protected areas across a variety of ecological conditions, and the provision of suitable  
5 “connectivity habitat,” within the surrounding “matrix” of less protected lands, to support the  
6 movement of Owls across the landscape between reserves, thus increasing their chances for  
7 survival.

8           67. The protected blocks of habitat established in the NWFP are referred to as Late  
9 Successional Reserves (“LSRs”) and are areas in which logging and other ground-disturbing  
10 activities are generally prohibited to protect the ecosystem and conserve the Owl and other  
11 species.

12           68. The LSR land allocation is incorporated into the STNF LRMP.

13                           ***Critical Habitat Designation for the Northern Spotted Owl***

14           69. The USFWS initially designated critical habitat for the Northern Spotted Owl in  
15 1992. 57 Fed. Reg. 1796.

16           70. In 2008, USFWS revised its critical habitat designation for the Northern Spotted  
17 Owl, reducing by approximately one-third the amount of land in northern California that it  
18 considered critical habitat for the Owl but continuing the designation of the Pettijohn Project  
19 area as Northern Spotted Owl critical habitat. 73 Fed. Reg. 47326.

20           71. In October 2010, the U.S. District Court for the District of Columbia entered an  
21 order requiring USFWS to re-consider its 2008 rule revising the Owl's critical habitat and  
22 issue a new proposed critical habitat rule by November 15, 2011 and a new final critical  
23



1 habitat rule by November 15, 2012. 76 Fed. Reg. 38576 (citing *Carpenters' Industrial*  
2 *Council v. Salazar*, Case No. 1:08-cv-1409-EGS (D.D.C.)).

3 72. The new final critical habitat rule for the Northern Spotted Owl was promulgated  
4 in December 2012 and went into effect on January 3, 2013 (“2012 CH Rule”). 77 Fed. Reg.  
5 71875.

6 73. The 2012 CH Rule defines the primary constituent elements “essential to the  
7 conservation of the NSO as forested areas that are used or likely to be used for nesting,  
8 roosting, foraging, or dispersing.”

9 74. The 2012 CH Rule indicates that the destruction or adverse modification  
10 determination is made at the scale of the entire critical habitat network; however “[a]  
11 proposed action that compromises the capability of a subunit or unit to fulfill its intended  
12 conservation function or purpose (e.g., demographic, genetic, or distributional support for  
13 NSO recovery) could represent an appreciable reduction in the conservation value of the  
14 entire designated critical habitat.”

15 ***Recovery Planning for the Northern Spotted Owl***

16 75. In 2008, the USFWS issued an ESA Recovery Plan for the Northern Spotted Owl.  
17 73 Fed. Reg. 29471.

18 76. This 2008 Recovery Plan was challenged in court, and the USFWS moved the  
19 U.S. District Court for the District of Columbia to vacate and remand the Recovery Plan to it  
20 for further review.

21 77. In September 2010, USFWS released a new draft revised Recovery Plan for the  
22 Northern Spotted Owl. 75 Fed. Reg. 56131.

1           78. In July 2011, USFWS issued a final revised Recovery Plan for the Northern  
2 Spotted Owl ("2011 Recovery Plan"). 76 Fed. Reg. 38575.

3           79. The 2011 Recovery Plan recognizes "past habitat loss and competition from  
4 Barred Owls, *Strix varia*, as the most pressing threats to Spotted Owl persistence." 76 Fed.  
5 Reg. 38575.

6           80. To address these threats, the 2011 Recovery Plan recommends increased habitat  
7 protection for the Owl in both occupied and unoccupied areas.

8           81. The 2011 Recovery Plan requires additional analysis of impacts to the Northern  
9 Spotted Owl resulting from projects which impact its prey species and cautions that "active  
10 management projects," such as the Pettijohn Project, should explicitly evaluate the short-term  
11 impacts to the Northern Spotted Owl and its prey while considering alleged long-term  
12 ecological benefits of such projects.

13           82. The 2011 Recovery Plan identifies thirty-three specific "Recovery Actions" that  
14 are the USFWS' recommendations to guide the activities needed to achieve the criteria  
15 necessary to recover the Northern Spotted Owl to the point where the species no longer needs  
16 the protection of the ESA.

17           83. Standard and Guideline 25(h) of the STNF LRMP requires consistency with an  
18 individual species' recovery plan, such as the 2011 Recovery Plan, in any action to maintain  
19 and/or enhance habitat for threatened and endangered species.

20                           ***Section 7 Consultation History of the Pettijohn Project***

21           84. On January 24, 2011, the USFS submitted a "Wildlife Biological Assessment &  
22 Biological Evaluation for the Pettijohn LSR Project" to the USFWS for informal consultation  
23 under Section 7 of the ESA for the Pettijohn Project, which the USFWS accepted as "final"  
24

1 on February 14, 2011 (“2011 BA”). Regarding the Northern Spotted Owl, the 2011 BA  
2 states: “In the short-term, it was determined that implementation of the proposed action may  
3 affect and would likely adversely affect the NSO through reduction of habitat quality.”

4 85. In 2012, the USFWS prepared a draft Biological Opinion for the Pettijohn Project  
5 (“2012 BO”).

6 86. In 2012, the USFS prepared a “Supplement to the Wildlife Biological  
7 Assessment” dated April 4, 2012 (“2012 SBA”) to provide additional information regarding  
8 the Pettijohn Project to inform the USFWS’ finalization of the 2012 BO.

9 87. On June 27, 2013, the USFS sent a written request to the USFWS for reinitiation  
10 of consultation on the Spotted Owl and its critical habitat.

11 88. On August 13, 2013, the USFS sent a “draft Supplemental BA” to the USFWS,  
12 which was followed by several years of back-and-forth communications, discussions and  
13 comments between the USFS and the USFWS regarding the Spotted Owl and its critical  
14 habitat.

15 89. On May 1, 2017, the USFS sent the draft (“2017 WSIR”) to the USFWS the to  
16 update and supplement information in the 2011 BA and 2012 SBA. The WSIR concluded  
17 that “the proposed actions may affect but would not likely adversely modify Designated  
18 Critical Habitat for the northern spotted owl.”

19 90. The USFWS responded to the USFS’ request for “technical assistance” with the  
20 draft 2017 WSIR on May 10, 2017, and stating that it was the responsibility of the USFS to  
21 request the reinitiation of formal consultation for the Pettijohn Project. On June 16, 2017, the  
22 USFS requested that the USFWS reinitiate formal consultation for the Pettijohn Project.  
23  
24



1           97. The USFS asserts that the project area contains four “Wildland-Urban Interfaces”  
2 (WUIs): 1) Weaverville, 2) Lewiston, 3) Trinity River Management Unit 2 and 4, and 4)  
3 Trinity River Management Unit 12. FEIS-2.

4           98. The stated “purpose and need” for the Pettijohn Project is to reduce fuel loads;  
5 support the effectiveness and safety of fire suppression and/or prescribed fire through the  
6 development of fuel management zones (FMZs); and accelerate the development of late-  
7 successional and old-growth forest components.

8           99. The Pettijohn Project was developed and is authorized under Section 102(a)(5)(B)  
9 of HFRA that authorizes projects to provide enhanced protection from catastrophic wildfire  
10 for threatened or endangered species and their habitat. 16 U.S.C. § 6512(5)(B).

11           100.       As initially proposed, the Proposed Alternative (alternative 2) includes the  
12 following activities: 958 acres of thinning including approximately 96 acres of thinning in  
13 riparian reserve; 1,846 acres of fuel management zone (“FMZ”) adjacent to roughly 36 miles  
14 of existing roads; fuels reduction by prescribed burning on 101 acres; and piling and burning  
15 of 11 acres in two areas outside the LSR. Construction of no more than 36 landings;  
16 construction of 0.95 miles of temporary roads to access landings; and decommissioning of  
17 2.3 miles of roads having negative effects on fish and water quality and which are difficult to  
18 maintain. FEIS-8. According to the 2019 SIR, the Pettijohn Project was amended to drop  
19 121 acres, including 50 acres of thinning-from-below in habitat classified as nesting and  
20 roosting and 71 acres in the FMZ in habitat classified as nesting and roosting.

21           101.       Forest Supervisor J. Sharon Heywood approved the Pettijohn Project via a  
22 Record of Decision on March 13, 2013.



1           106.       Although the Defendants relied upon and applied the 2009 Guidelines as  
2       the “best available science” to define and provide values for suitable habitat conditions for  
3       nesting/roosting, foraging and dispersal of the Owl, and for other purposes, in the 2018 SBO,  
4       the 2017 WSIR, and other analyses, in fact the 2009 Guidelines were developed for the  
5       purpose of ensuring timber harvest plans on private lands do not result in incidental take of  
6       the Northern Spotted Owl, and are not the “best available science” or even applicable for the  
7       purpose of analyzing the habitat conditions required for the conservation or recovery of the  
8       Northern Spotted Owl.

9           107.       The suitable habitat values provided in the 2009 Guidelines are  
10       inconsistent with standards and guidelines under other applicable planning and guidance  
11       documents that provide standards and guidelines drafted to inform the conservation and  
12       recovery of the Spotted Owl including, without limitation, the NWFP, the 2012 CH Rule, and  
13       the 2011 Recovery Plan.

14          108.       In relying on the 2009 Guidelines, the Defendants failed to apply  
15       guidelines that provide definitions and values for suitable habitats necessary to conserve and  
16       recover the Owl contained in other applicable planning and guidance documents including,  
17       without limitation, the NWFP, the 2012 CH Rule, and the 2011 Recovery Plan.

18          109.       In failing to use the best available scientific and commercial information,  
19       the Defendants have taken agency action that is arbitrary, capricious, an abuse of discretion,  
20       and otherwise not in accordance with Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), or  
21       the procedures required by law in violation of the APA. 5 U.S.C. § 706(2)(A) & (D).





1           114.       By establishing suitable habitat values at or below the minimum  
2 thresholds necessary for the conservation and recovery of the Owl, in reliance on the 2009  
3 Guidelines that are not applicable to the determinations required under Section 7(a)(2),  
4 inadequate to inform the planning and implementation of the Project activities likely to affect  
5 the Owl and its Critical Habitat, are inconsistent with standards and guidelines applicable  
6 under other planning and guidance documents (including, without limitation, the 2012 CH  
7 Rule, the 2011 Recovery Plan, and the NWFP), and inferior to other available information.

8           115.       By establishing and using flawed, inaccurate and/or minimal habitat  
9 values (including, without limitation, values for Basal Area, Quadratic mean diameter,  
10 “Large” trees/acre, and Canopy closure/cover) to inform “thinning from below” and other  
11 Project actions, the Defendants are likely to jeopardize the survival and recovery of the Owl,  
12 or destroy or adversely modify its Critical Habit, by inaccurately analyzing the effects of,  
13 without limitation, (a) lowering the quality of existing “High Quality” Nesting/Roosting  
14 habitat; (b) lowering the quality of existing Foraging habitat to “Low-quality” Foraging  
15 habitat; (c) downgrading Foraging habitat to Dispersal habitat; (d) and the removal of  
16 “Large” trees without establishing a definition or guideline based on size, age or other  
17 determinable value to ensure retention of “Old Growth” in late-successional forest in the  
18 Action Area.

19           116.       By reducing the quality of Nesting/Roosting and Foraging habitats without  
20 the restoration of such habitats or creation of new habitat within a 50-year timeframe;

21           117.       By causing adverse effects to essential “physical and biological features”  
22 (PBFs) described in the 2102 CH Rule to an extent that the intended conservation function or  
23 purpose of the designated Critical Habitat for the Owl is appreciably reduced.

1           118.       By the removal of all snags, or retention of an insufficient amount or  
2           quality of snags, within the FMZ to maintain suitable habitats for the Owl, and “Old Growth”  
3           in late successional forest within the FMZ.

4           119.       By the removal of all vertical structure/understory, or retention of an  
5           inadequate amount or complexity of vertical structure/understory, necessary to retain “Old  
6           Growth” in late-successional forest in the Action Area.

7           120.       By failing to fully consider, apply or be consistent with the standards and  
8           guidelines set forth in the 2011 Recovery Plan and 2012 CH Rule establishing minimum  
9           values for Northern Spotted Owl Activity Centers when analyzing the direct and indirect  
10          effects of the Project on such Action Areas and their resident Owls including, without  
11          limitation, by ignoring or dismissing the adverse effects of the Project that reduced the  
12          amount, quality or functionality of Nesting/Roosting and Foraging habitats within certain  
13          Activity Centers, both occupied and historically occupied, located within the Action Area.

14          121.       By failing to fully consider, apply or be consistent with the guidance for  
15          recovery of the Owl contained in the 2011 Recovery Plan including, without limitation,  
16          Recovery Actions 10 and 32.

17          122.       By failing to establish an accurate and complete environmental baseline  
18          for full and complete analysis of the effects of the Project on the Owl Critical Habitat  
19          including, without limitation, inclusion of all past activities on private lands that have  
20          adversely affected Owl suitable habitat within the Action Area, with particular attention to  
21          private lands that are adjacent to, or within the range of, occupied and historically occupied  
22          Activity Centers within the Action Area.



1 USFWS Yreka Office in cooperation with the USFS, to “update and assess habitat conditions  
2 (baseline) for northern spotted owl (NSO), and to update and asses[s] the status of the  
3 species’ designated critical habitat.”

4 129. The 2018 Baseline Adjustment provides new information on the impacts  
5 of wildfires from 2010 – 2018 to Northern Spotted Owl “suitable” habitat and to its Critical  
6 Habitat in the STNF and three other National Forests in northern California.

7 130. The 2018 Baseline Adjustment provides an “Interim Baseline” that is the  
8 USFWS’ best current estimate of the amount of suitable Northern Spotted Owl habitat  
9 (including Dispersal habitat) in the four National Forests.

10 131. Further, the 2018 Baseline Adjustment provides a “Critical Habitat  
11 Baseline Adjustment” that “utilizes the best available information to date to describe the  
12 change in and current habitat conditions for the Owl from wildfires within the California  
13 Klamath, California Cascades, and California Coast physiographic provinces, allowing the  
14 [Yreka Fish and Wildlife Service Office] . . . to better assess the status of the species and its  
15 critical habitat.”

16 132. The 2018 Baseline Adjustment states that between 2007 and 2018 the four  
17 National Forests lost a combined 97,364 acres, or 4%, of their Northern Spotted Owl suitable  
18 habitat. During the same period, the STNF experienced a loss of 7% of its Northern Spotted  
19 Owl suitable habitat.

20 133. The 2018 Baseline Adjustment states that between 2010 and 2018  
21 wildfires reduced the Nesting/Roosting habitat in Critical Habitat Unit 11 by -42.2%,  
22 Foraging habitat was reduced by -22.2% and Dispersal habitat by -31.4%. In Critical Habitat  
23  
24

1 Subunit ICC 7, between 2012 and 2018 wildfires reduced Nesting/Roosting habitat by -4,522  
2 acres, Foraging habitat by -70 acres, and Dispersal habitat by -1,476 acres.

3 134. Applying the new information provided by the 2018 Baseline Adjustment  
4 significantly effects the environmental baseline used in the 2017 WSIR and the 2018 SBO by  
5 changing the baseline acreages of suitable Owl habitat and Critical Habitat rangewide as well  
6 as for the California Klamath Physiographic Province, Critical Habitat Unit 11 and Subunit  
7 ICC-7, which in turn under-estimates the effects of the Pettijohn Projects on Critical Habitat  
8 at the rangewide, province, CHU and Subunit scales.

9 135. By failing to reinitiate consultation following the availability of the new  
10 information contained in the 2018 Baseline Adjustment as required under 50 C.F.R. §  
11 402.16(b), the USFS and USFWS have failed to insure the effects of the Pettijohn Project  
12 will not jeopardize the continued existence of the Northern Spotted Owl or adversely modify  
13 its designated critical habitat in violation of 16 U.S.C. § 1536(a)(2), and have taken agency  
14 action that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance  
15 with the ESA and its implementing regulations, or the procedures required by law in  
16 violation of the APA. 5 U.S.C. § 706(2)(A) & (D).

17 136. Plaintiffs are entitled to its reasonable fees, costs, and expenses associated  
18 with this litigation pursuant to the ESA, 16 U.S.C. § 1540(g) and/or Equal Access to Justice  
19 Act, 28 U.S.C. § 2412.

20 **CLAIM IV**

21 **(USFWS)**

22 **Violation of the ESA Section 1536(b)(4) and the APA**

23 **Arbitrary Issuance of Incidental Take Statement**

1           137.       Plaintiffs incorporate by reference all preceding paragraphs.

2           138.       The ESA prohibits "take" of species listed as endangered. 16 U.S.C. §  
3 1538(a)(1)(B). The USFWS has extended this "take" prohibition to threatened species by  
4 regulation. 50 C.F.R. § 17.31(a). The USFWS lists the Northern Spotted Owl as threatened.  
5 55 Fed. Reg. 26114.

6           139.       To "take" means to *harass, harm, pursue, hunt, shoot, wound, kill, trap,*  
7 *capture or collect, or attempt to engage in any such conduct.* 16 U.S.C. § 1532(19) (*emphasis*  
8 *added*).

9           140.       "Harass" means an intentional or negligent act or omission which creates  
10 the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt  
11 normal behavioral patterns which include, but are not limited to, breeding, feeding, or  
12 sheltering. 50 C.F.R. § 17.3.

13           141.       "Harm" means an act which actually kills or injures wildlife. Such act may  
14 include significant habitat modification or degradation where it actually kills or injures  
15 wildlife by significantly impairing essential behavioral patterns, including breeding, feeding  
16 or sheltering. *Id.*

17           142.       In the 2012 BO and the 2018 SBO, the USFWS determined that the  
18 Pettijohn Project would take via harassment two pairs of adult Northern Spotted Owls in two  
19 separate activity centers.

20           143.       Where the USFWS concludes, as it did here, that a proposed action will  
21 not jeopardize the continued existence of a listed species or adversely modify its critical  
22 habitat, but will result in the incidental take of the species, the USFWS must provide an  
23 "Incidental Take Statement" ("ITS") to the action agency. 16 U.S.C. § 1536(b)(4); 50 C.F.R.

1 § 402.14(i)(1). The ITS must specify the impact (amount and extent) of such incidental  
2 taking on the species and specify the reasonable and prudent measures USFWS considers  
3 necessary or appropriate to minimize such impact. 50 C.F.R. § 402.14(i)(1). Further, the ITS  
4 must set forth terms and conditions to implement the reasonable and prudent measures. *Id.*

5 144. The USFWS's "take" analysis failed to find a taking of the Northern  
6 Spotted Owl by "harm" (*i.e.* habitat destruction) in addition to a taking via harassment, even  
7 though the record makes it abundantly clear that "harm" will occur and that identified pairs of  
8 Owls will be killed.

9 145. The ITS fails to clearly articulate the amount or extent of the anticipated  
10 incidental taking or the impact of this level of take on the species at the local CHU or Subunit  
11 level. The ITS also fails to specify reasonable and prudent measures necessary or appropriate  
12 to minimize the anticipated take and fails to set forth terms and conditions to enforce any  
13 reasonable and prudent measures.

14 146. Accordingly, for the reasons stated above, the ITS issued by the USFWS  
15 to the USFS to allow it to take Northern Spotted Owls, is arbitrary, capricious, an abuse of  
16 discretion, and otherwise not in accordance with the ESA and its implementing regulations or  
17 the procedures required by law in violation of the APA. 5 U.S.C. § 706(2)(A) & (D).

18 147. Plaintiffs are entitled to its reasonable fees, costs, and expenses associated  
19 with this litigation pursuant to the ESA, 16 U.S.C. § 1540(g) and/or Equal Access to Justice  
20 Act, 28 U.S.C. § 2412.

21 **CLAIM V**

22 **(USFS)**

23 **Violation of NFMA and the APA**

1                                   **Failure to Satisfy Forest Plan Standard for Snags/Down Logs**

2                   148.       Plaintiffs incorporate by reference all preceding paragraphs.

3                   149.       NFMA mandates that the USFS’ activities carried out on the National  
4                   Forests “shall be consistent with land management plans.” 16 U.S.C. § 1604(I); 36 C.F.R. §  
5                   219.10(e).

6                   150.       The STNF LRMP, including its incorporation of the Northwest Forest  
7                   Plan (NWFP) Record of Decision, is a “land management plan.”

8                   151.       The STNF LRMP requires snags and down logs in Late-Successional  
9                   Reserves be maintained at naturally occurring levels or two to six snags per acre and four to  
10                  six down logs per acre. LRMP 4-38. This standard will not be met in the fuel management  
11                  zones that cover 1,846 acres and range from 150 to 1,200 feet from the road edge.

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

15                  153.       Plaintiffs are entitled to its reasonable fees, costs, and expenses associated  
16                  with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

17                                   **CLAIM VI**

18                                   **(USFS)**

19                                   **Violation of NFMA and the APA**

20                                   **Violation of Old-Growth Retention Standard**

21                   154.       Plaintiffs incorporate by reference all preceding paragraphs.



1           155.       NFMA mandates that the USFS' activities carried out on the National  
2       Forests "shall be consistent with land management plans." 16 U.S.C. § 1604(I); 36 C.F.R. §  
3       219.10(e).

4           156.       The STNF LRMP, including its incorporation of the Northwest Forest  
5       Plan (NWFP) Record of Decision, is a "land management plan."

6           157.       The project area is located within the area managed under the direction of  
7       the Northwest Forest Plan. The Northwest Forest Plan is designed around the conservation  
8       needs of the Spotted Owl and other "Old Growth" associated species. The Northwest Forest  
9       Plan was based on the designation of a variety of land use allocations whose objectives are  
10      either to provide for Spotted Owl population clusters or to maintain connectivity between  
11      population clusters. Several land use allocations are intended to contribute primarily to  
12      supporting population clusters, including Late-Successional Reserves and Managed Late-  
13      Successional Reserves.

14          158.       The Northwest Forest Plan requires the "[r]etention of old growth  
15      fragments where little remains," and acknowledges that older, denser conifer stands typically  
16      provide better habitat conditions for species associated with old growth forests such as the  
17      Spotted Owl. Spotted Owl habitat quality improves with age and canopy cover.

18          159.       The District Biologist made several recommendations regarding this  
19      standard, which the USFS ignored without explanation.

20          160.       The USFS failed to indicate what quantity of Old Growth would exist in  
21      any of the three watersheds within the Pettijohn Project after the Project is finished.

22          161.       The USFS calculated all late-successional habitat to meet the 15%  
23      standard rather than the Old Growth component of late-successional habitat.



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

2           170.       The Pettijohn project is one of many timber sales on the STNF in Spotted  
3 Owl critical habitat and within a LSR. The USFS has separately analyzed and/or approved  
4 many projects that also involve Spotted Owl habitat, including the Algoma, Big Mtn.,  
5 Brown's Deer Creek, Eagle Ranch, East Fork, Edson, Gemmill, Harris, Miners Salvage,  
6 Moosehead, Mudflow, Pilgrim, Porcupine, Powder, Rattlesnake, Trough and Trout Creek  
7 projects. These projects combined total hundreds of millions of board feet of timber  
8 impacting designated Owl critical habitat.

9           171.       The Record of Decision for the Pettijohn Project violates NEPA because it  
10 fails to adequately analyze and disclose the direct, indirect, and cumulative effects of the  
11 Project in several respects including, without limitation, as described below.

12           172.       *Inadequate Analysis of the No-Action Alternative.* The USFS failed to  
13 adequately analyze the no-action alternative. The USFS failed to adequately consider an  
14 analyze the actual impacts of the no-action alternative that is required by NEPA, including the  
15 benefits that alternative would provide to the Spotted Owl when compared to the action  
16 alternative.

17           173.       *Environmental Baseline.* The USFS failed to take a hard look at the  
18 environmental baseline for the Pettijohn Project, which resulted in a skewed and inaccurate  
19 effects analysis.

20           174.       *Cumulative impacts.* The USFS failed to take a hard look at or adequately  
21 analyze the cumulative effect of past, present, and known upcoming projects on the Spotted  
22 Owl and Spotted Owl critical habitat. The information contained in the FEIS is contradictory  
23 as it relates to cumulative effects and the tables in Attachment 5 (including Table A5-2, A5-

24

1 3, A5-4, and A5-6) fail to analyze or document the cumulative effects of the on Spotted Owl  
2 critical habitat. The cumulative actions table in Appendix E also fails to analyze the  
3 cumulative effects of the Pettijohn Project in relation to other projects.

4 175. *Impacts to Spotted Owl.* The USFS failed to adequately analyze impacts  
5 of the Project to the Spotted Owl, including but not limited to the impacts to the Spotted Owl  
6 from Project noise, reduction in prey species, territorial Barred owls, beneficial impacts to  
7 the Spotted Owl under the no-action alternative, the impacts from high-severity wildfire, and  
8 removal of large trees,

9 176. *Inadequate Information.* The USFS has not gathered adequate information  
10 about how the health and status of the Spotted Owl within the Project area which skews the  
11 environmental baseline for determination of the effects analysis. The USFS also  
12 acknowledged that it does not have high value habitat within the Spotted Owl's core areas,  
13 and only proposes to gather and designate this information in the field, after the NEPA  
14 analysis has concluded.

15 177. *Old Growth/Large Tree Removal.* The USFS failed to take a hard look at  
16 the effect of removing old growth and large trees that provide habitat for the Spotted Owl.

17 178. *Inaccurate Analysis of the Project Impacts.* The USFS failed to take a  
18 hard look at impacts of the Project on the Owl and its critical habitat by inaccurately  
19 calculating or representing such impacts in the FEIS, 2017 WSIR and ROD including,  
20 without limitation the summary of impacts to the Pettijohn Project Action Area contained in  
21 Table 1 of the 2017 WSIR.

1           179.       *Wildland Urban Interface*. The USFS failed to take a hard look at and  
2 unlawfully designated the entirety of the Pettijohn Project treatment area as “Wildland Urban  
3 Interface,” requiring heightened fire prevention.

4           180.       *Wildfire*. A major premise for the Pettijohn Project is to protect the LSR  
5 from a “catastrophic” wildfire. The USFS, however, failed to take a hard look at the  
6 likelihood of a “catastrophic” wildfire within the Project area, to consider the benefits of  
7 wildfire to the habitat, the direction in its own LSR Assessment regarding wildfire in LSR  
8 habitat, and ignored scientific evidence that Owls use burned forest as habitat.

9           181.       The USFS ignored valid scientific evidence undermining its assumptions  
10 about wildfire, including the value of retaining larger trees to lessen fire severity.

11           182.       The USFS overstated fire risk while understating the adverse  
12 consequences of active management. The USFS improperly applied a worst-case scenario of  
13 climate and fuels in its modeling program, unjustly portraying the fuel management zone  
14 areas and risks.

15           183.       The USFS unreasonably anticipates that treatments in thinning areas will  
16 be effective for 50 years. This assumption is contrary to the well-accepted research that  
17 shows thinning is generally effective for only 10 to 20 years. This will result in further  
18 disturbance of the habitat in 10 to 20 years to maintain any benefit from reduction of wildfire  
19 from the Project.

20           184.       The piling of fuels presents increased fire risk to the Project area for years  
21 into the future but this post-Project fire risk is not incorporated into the fire risk models used  
22 to justify the action alternative.

1           185.       The USFS failed to address the effect of the location of the Project –  
2 bordered by water bodies and a road – when arguing in favor of fire containment.

3           186.       The USFS failed to address that the “best available science” for Northern  
4 California documents that fire risk is greatest in small diameter trees, not old, large trees or  
5 Old Growth forest.

6           187.       *Removal of Old Growth and Closed Canopy.* The USFS failed to take a  
7 hard look at the Project’s impacts associated with the removal of Old Growth and closed  
8 canopy structure. The USFS acknowledges it lacks on-the-ground information about canopy  
9 structure, but the USFS proposes thinning in closed-canopy units, which is not justified under  
10 the agency’s own studies and rationale. The District Biologist made several  
11 recommendations to analyze the ecological role of particular stands as it relates to Old  
12 Growth habitat, consider silvicultural treatments in younger stands, and avoid harvesting in  
13 particular old growth stands. These recommendations were ignored by the USFS.

14           188.       The USFS has not demonstrated that the Project will satisfy the NWFP  
15 standard of retaining 15% of Old Growth, maintain the values for Old Growth in treated  
16 areas, and has not adequately analyzed impacts of treatments to Old Growth and the species  
17 that rely upon Old-Growth forests.

18           189.       The HFRA allows Old Growth logging in a project if the project will  
19 “fully maintain, or contribute toward the restoration of, the structure and composition of old  
20 growth stands according to the pre-fire suppression old growth conditions characteristic of  
21 the forest type, taking into account the contribution of the stand to landscape fire adaptation  
22 and watershed health, and retaining large trees contributing to old growth structure.” 16  
23 U.S.C. § 6512(e)(2).

1           190.       The Pettijohn Project Biological Assessment acknowledges that prior to  
2 USFS suppression efforts, the Project area was largely composed of Old Growth forest.

3           191.       The HFRA also contains a requirement to protect “large” trees:

4           “Except in old growth stands where the management direction is consistent with  
5 subsection (e)(2), the Secretary shall carry out a covered project in a manner that –  
6 (A) focuses largely on small diameter trees, thinning, strategic fuel breaks, and  
7 prescribed fire to modify fire behavior, as measured by the projected reduction of  
8 uncharacteristically severe wildfire effects for the forest type (sch as adverse soil  
9 impacts, tree mortality or other impacts); and (B) maximizes the retention of large  
10 trees, as appropriate for the forest type, to the extent that the trees promote fire-  
11 resilient stands.”

12 16 U.S.C. § 6512(f).

13           192.       The USFS failed to substantively analyze whether the Project will satisfy  
14 the HFRA requirements above.

15           193.       *Removal of Snags.* The USFS failed to take a hard look at the effect to the  
16 Spotted Owl of removal of snags throughout the project and the FMZ.

17           194.       *Greenhouse Gases.* The USFS failed to take a hard look at the carbon  
18 effects and balance of the Project including, without limitation, at the effects of the Project  
19 resulting in the release of soils carbon, at the effects of the Project on Old Growth stands as  
20 climate refugia and carbon storage and their ability to sequester significant amounts of  
21 atmospheric carbon, the release of carbon from the creation and use of wood products from  
22 logged timber from the Project, the release of carbon from burning as part of the Project  
23 activities, and the unsupported assumption that a wildfire in the Project area would result in  
24 greater carbon release than the carbon effects of the Project activities. The USFS further  
failed to take a hard look at the effect and influence of climate change on Project, as well as  
the effect and influence of the Project on the climate.







1 USFWS in cooperation with the USFS to update the baseline for the Spotted Owl. The 2018  
2 Baseline Adjustment provides significant new information on the impacts of wildfires from  
3 2010-2018 on Spotted Owl habitat in the STNF and three other national forests in northern  
4 California.

5 209. The 2018 Baseline Adjustment creates an interim baseline that underpins  
6 the USFWS' current estimate of suitable Spotted Owl habitat. The 2018 Baseline  
7 Adjustment provides a critical habitat baseline adjustment that "utilizes the best available  
8 information to date to describe the change in and current habitat conditions for the Owl from  
9 wildfires within the California Klamath, California Cascades, and California Coast  
10 physiographic provinces, allowing the [Yreka Fish and Wildlife Service Office] . . . to better  
11 assess the status of the species and its critical habitat." The 2018 Baseline Adjustment states  
12 that between 2007 and 2018 the four National Forests lost a combined 97,364 acres, or 4%,  
13 of their Northern Spotted Owl suitable habitat, and the STNF experienced a loss of 7% of its  
14 Northern Spotted Owl suitable habitat. The 2018 Baseline Adjustment states that between  
15 2010 and 2018 wildfires reduced the Nesting/Roosting habitat in CH Unit 11 by -42.2%,  
16 Foraging habitat was reduced by -22.2% and Dispersal habitat by -31.4%. In CH Subunit  
17 ICC 7, between 2012 and 2018 wildfires reduced Nesting/Roosting habitat by -4,522 acres,  
18 Foraging habitat by -70 acres, and Dispersal habitat by -1,476 acres.

19 210. The new information provided by the 2018 Baseline Adjustment  
20 significantly effects the environmental baseline used in the 2017 WSIR and the 2018 SBO by  
21 changing the baseline acreages of suitable Owl habitat and Critical Habitat rangewide as well  
22 as for the California Klamath Physiographic Province, Critical Habitat Unit 11 and Subunit  
23

1 ICC-7, which in turn under-estimates the effects of the Pettijohn Projects on Critical Habitat  
2 at the rangewide, province, CHU and subunit scales.

3 211. The Forest Service's decision not to prepare supplemental NEPA analysis  
4 in light of the finalization of the 2012 Critical Habitat Rule, as indicated in the USFS' 2019  
5 SIR, was arbitrary and capricious.

6 212. The Forest Service's decision not to prepare supplemental NEPA analysis  
7 for the gray wolf (*Canis lupus*) in light of its discovery in California, as well as the Shasta  
8 Pack, as indicated in the 2019 SIR, was arbitrary and capricious.

9 213. The Forest Service's decision not to prepare supplemental NEPA analysis  
10 in light of increased barred owl populations within the Pettijohn Project's action area, as  
11 indicated in the 2019 SIR, was arbitrary and capricious because barred owls have concededly  
12 impacted nesting and roosting of the already-declining Spotted Owl.

13 214. The Forest Service's decision not to prepare supplemental NEPA analysis  
14 in light of Northern Spotted Owl nest movements and new activity centers, as indicated in  
15 2019 SIR, was arbitrary and capricious. Of the four original activity centers

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

19 216. Plaintiffs are entitled to its reasonable fees, costs, and expenses associated  
20 with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

21 **CLAIM X**

22 **(USFS)**

23 **Violation of NFMA and the APA**

**The Pettijohn Project is Not Consistent with the 2012 Revised Recovery Plan**

217. Plaintiffs incorporate by reference all preceding paragraphs.

218. Standard and Guideline 25(h) of the STNF LRMP requires consistency with an individual species' recovery plan, such as the 2011 Recovery Plan, in any action to maintain and/or enhance habitat for threatened and endangered species.

219. Defendant USFS has violated NFMA by failing to fully consider, apply or be consistent with the guidance for recovery of the Owl contained in the 2011 Recovery Plan including, without limitation, consistency with Recovery Actions 10 and 32.

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

221. Plaintiffs are 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.

**PLAINTIFF'S PRAYER FOR RELIEF**

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

- declare that Defendant USFS violated NEPA;
- declare that Defendant USFS violated NFMA;
- declare that Defendant USFS violated the ESA;
- declare that Defendant USFS violated the APA;
- declare that Defendant USFWS violated the ESA;
- declare that Defendant USFWS violated the APA;



**CERTIFICATE OF SERVICE**

I hereby certify that on September 30, 2019, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send a notification of this filing to the attorneys of record.

/s/Sean T. Malone  
SEAN T. MALONE  
Attorney at Law