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15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
17 **FRESNO DIVISION**

18 EARTH ISLAND INSTITUTE and
19 CENTER FOR BIOLOGICAL
20 DIVERSITY,

21 Plaintiffs,

22 v.

23 DEAN GOULD, in his official capacity as
24 Forest Supervisor for the Sierra National
25 Forest, and UNITED STATES FOREST
26 SERVICE, an agency of the Department of
27 Agriculture,

28 Defendants.

Case No. 1:14-CV-01140 KJM-SKO

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

INTRODUCTION

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2 1. Until the late 1980s, old-growth forests were pejoratively described as “decadent” and
3 “over-mature”, and U.S. Forest Service policy was to clearcut these forests to replace them with tree
4 plantations, which were seen as more productive and beneficial. Old-growth forests, prior to that time,
5 were generally viewed as having relatively little value, other than for lumber. By the early 1990s,
6 however, the ecological science had caught up with the Forest Service and it became widely known that
7 old-growth forests are highly biodiverse, with many rare and threatened wildlife species associated
8 with and dependent upon such forests. In the 1990s, the Spotted Owl became a household name, and a
9 new understanding of old-growth forests emerged—one that viewed this habitat as ecologically
10 valuable, and precious. The same transition is occurring right now with regard to “complex early seral”
11 forest—areas of mature conifer forest that experience patches of moderate to high-intensity fire,
12 wherein most or all trees are killed. While the Forest Service continues to portray such areas as
13 destroyed by, or lost to, fire, in order to justify post-fire logging (the Forest Service keeps 100% of the
14 revenue from post-fire logging, creating a powerful perverse financial incentive), there now exists an
15 abundance of ecological science, including the agency’s own, directly contradicting the Forest Service
16 on this point. This science shows that the Forest Service’s positions and assumptions are outdated and
17 fundamentally flawed. Just as the science caught up with the Forest Service on old-growth forests, it
18 has now caught up with the agency with regard to post-fire habitat, and we now know that these forests
19 affected by fire—especially the patches that burn hottest and create the most “snags” (fire-killed trees
20 that remain standing)—are ecological treasures. As an October 30, 2013, letter to Congress from about
21 250 scientists from across the nation explains: “This post-fire habitat, known as ‘complex early seral
22 forest,’ is quite simply some of the best wildlife habitat in forests and is an essential stage of natural
23 forest processes. Moreover, it is the least protected of all forest habitat types and is often as rare, or
24 rarer, than old-growth forest, due to damaging forest practices encouraged by post-fire logging policies
25” Yet, when this extensive body of knowledge was presented to the Forest Service during
26 comments on the challenged post-fire logging project at issue in this case (the Aspen Project on the
27 Sierra National Forest), the agency looked to the past, relying upon its decade-old forest plan (the 2004
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1 Sierra Nevada Forest Plan Amendment). For example, when presented by Plaintiffs with new scientific
2 information showing that complex early seral forest created by high-intensity fire is suitable foraging
3 habitat for California Spotted Owls, *that the owls preferentially select this habitat*, and that post-fire
4 logging is associated with loss of occupancy within Spotted Owl territories, the Forest Service
5 parenthetically acknowledged that the current science finds that moderate- and high-intensity fire areas
6 are suitable Spotted Owl foraging habitat, while inexplicably concluding, in the same sentence, that
7 “the proposed project would not result in *any* additional reduction of spotted owl habitat beyond what
8 was caused by the Aspen Fire”, putting on its blinders and referencing the outdated 2004 forest plan
9 (cited as “SNFPA (2004)”), which assumes that such areas are non-habitat for Spotted Owls, and that
10 impacts to Spotted Owls from post-fire logging in such habitat can be ignored on this basis (Aspen
11 Response to Comments, p. 142).

12 2. Through this action, Plaintiffs Earth Island Institute and Center for Biological Diversity
13 challenge the “Aspen Recovery and Reforestation Project” (“Aspen Project”) within the 2013 Aspen
14 Fire in the Sierra National Forest, administered by the U.S. Forest Service. According to the EA and
15 DN for the Aspen Project, the Forest Service proposes to conduct post-fire “salvage” logging,
16 removing approximately 1,835 acres, mostly in complex early seral forest habitat on national forest
17 lands in a remote area approximately 22-25 miles east of Oakhurst, California, plus an additional 3,239
18 acres of post-fire logging in currently lower-intensity areas that the Forest Service predicts will have
19 higher proportions of tree mortality by 2015 and beyond, and 1,125 acres of roadside logging (Aspen
20 EA, p. 15). Both Projects would also involve the eradication of much of the native post-fire shrub
21 habitat through mechanical and other means, such as intensive herbicide use.

22 3. “Complex early seral forest”, also known as snag forest habitat, is one of the rarest and
23 least protected of all forest habitat types in the Sierra Nevada. Due to fire suppression policies, it is
24 estimated there is now about one-fourth as much higher-intensity fire—the type of fire that creates
25 complex early seral forest—as there was prior to the early 20th century (Hanson and Odion 2014, Odion
26 et al. 2014), and even the Forest Service’s scientists admit that less of this habitat is created by fire each
27 year currently, as compared to amounts prior to fire suppression policies (Mallek et al. 2013) (Table 3,
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1 showing that the annual area of high-severity [AAHS] for the forest types that dominate the Aspen
2 project area—dry mixed-conifer [DMC], moist mixed-conifer [MMC], and yellow pine [YP] is 6,473
3 hectares [15,988 acres] in the Sierra Nevada, while it was 8,910 hectares [22,008 acres] historically).
4 This deficit is further exacerbated by losses due to post-fire logging of snags (standing fire killed trees)
5 and eradication of native fire-following shrubs. This habitat—if not subjected to post-fire logging—
6 supports levels of native biodiversity and wildlife abundance comparable to, and even higher than, that
7 of unburned mature/old forest (Raphael et al. 1987, Burnett et al. 2010, Swanson et al. 2011). In
8 complex early seral forest, native wood-boring beetles lay their eggs on snags, and their larvae, after
9 boring into the snag, become the primary food source for Black-backed Woodpeckers and other
10 woodpecker species (Hanson and North 2008, Siegel et al. 2013). In fact, each adult Black-backed
11 Woodpecker consumes over 13,500 wood-boring beetle larvae each year. The Black-backed
12 Woodpecker is a monogamous species that is the strongest cavity excavator in North America.
13 Anatomically distinct, they have only three toes, instead of four, so that their strike on a recently killed
14 tree has more force (allowing them to prey upon beetle larvae that other woodpeckers have difficulty
15 reaching). Their tongues are extremely long and attached to the back of their skull so that it can
16 forcefully penetrate deep within the wood of the tree to extract the larvae, and they have fluid sacks
17 behind their eyes to protect their brains from damage from their hard strikes (Dixon and Saab 2000).
18 Black-backed Woodpeckers create a new nest cavity every year (even when they stay in the same
19 territory), allowing the cavity from the previous year to be used by the many cavity-nesting species that
20 cannot create their own nest holes, like bluebirds, nuthatches, chickadees, and even flying squirrels
21 (Tarbill 2010). Native flowering shrub patches in complex early seral forest attract native flying
22 insects, which provide food for flycatching birds and rare and sensitive bat species (Swanson et al.
23 2011, Buchalski et al. 2013), and these shrub patches are excellent habitat for small mammals which, in
24 turn, provides food for raptors like the California Spotted Owl, which preferentially selects such areas
25 to find its prey (Bond et al. 2009, Bond et al. 2013). This is a rich and vibrant ecosystem, if left
26 unlogged.

1 California. EII is a membership organization with over 15,000 members in the U.S., over 3,000 of
2 whom use and enjoy the National Forests of California for recreational, educational, aesthetic, spiritual,
3 and other purposes. EII, through its John Muir Project, has recently appealed numerous timber sales on
4 National forests in the Sierra Nevada, including the Projects at issue in this case which, if implemented,
5 would adversely affect the interests of their members. EII through its John Muir Project has a
6 longstanding interest in protection of national forests. EII's John Muir Project and EII members
7 actively participate in governmental decision-making processes with respect to national forest lands in
8 California and rely on information provided through the NEPA processes to increase the effectiveness
9 of their participation.

10 8. Earth Island Institute's members include individuals who regularly use public lands
11 within the Sierra National Forest, and the Aspen fire area in particular, for scientific study, recreational
12 enjoyment, aesthetic beauty, and nature photography. These members' interests will be irreparably
13 harmed by the planned logging in the Aspen fire area, as they will no longer be able to scientifically
14 study this area in its natural (pre-logging) state, take nature photographs of the area in its natural (pre-
15 logging) state, or enjoy the aesthetic beauty of the unlogged snag forest habitat and its inhabitants in
16 their natural state.

17 9. Plaintiff Center for Biological Diversity ("the Center") is a non-profit corporation with
18 offices in San Francisco, Los Angeles, and Joshua Tree, California; Nevada; Oregon; Washington;
19 Arizona; New Mexico; Alaska; and Washington, D.C. The Center is actively involved in species and
20 habitat protection issues throughout North America and has more than 42,000 members, including
21 many members who reside and recreate in California. One of the Center's primary missions is to
22 protect and restore habitat and populations of imperiled species, including from the impacts of logging
23 and climate change.

24 10. The Center's members and staff include individuals who regularly use and intend to
25 continue to use the Sierra National Forest, including the lands that were affected by the Aspen fire and
26 are now planned for logging as part of this Project. These members and staff use the area for
27 observation, research, aesthetic enjoyment, and other recreational, scientific, spiritual, and educational
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1 activities. Many of the Center's staff and members use the area to observe and study imperiled species
2 like the Black-backed Woodpecker, California Spotted Owl, and Pacific Fisher that, since the Aspen
3 fire burned, can be found in project area. These members' interests will be irreparably harmed by the
4 planned logging in the fire area, as they will no longer be able to visit and enjoy this area in its
5 unlogged state, nor will they be able to observe or attempt to observe the Black-backed Woodpecker,
6 California Spotted Owl, Pacific Fisher, or other species which use and are dependent on these areas in
7 their unlogged state.

8 11. This suit is brought by EII and the Center on behalf of themselves and their adversely
9 affected members and staff. Plaintiffs and their members' present and future interests in and use of the
10 Project area are and will be directly and adversely affected by the challenged decision. Those adverse
11 effects include, but are not limited to: (1) impacts to native plants and wildlife and their habitats within
12 and around the Project area from logging, biomass removal, soil compaction, noise, and human
13 presence; (2) impacts to riparian areas and water quality; (3) reduction and impairment of recreation
14 opportunities; (4) impaired aesthetic value of forest lands, trails, and landscapes caused by Defendants'
15 logging; and (5) loss of scientific study opportunities with regard to Black-backed Woodpecker,
16 California Spotted Owl, and Pacific Fisher use of unlogged post-fire habitat, and loss of scientific study
17 opportunity with regard to natural post-fire conifer regeneration in areas proposed for logging. In
18 addition, Plaintiffs and their members and staff have an interest in ensuring that Defendants comply
19 with all applicable laws, regulations, and procedures pertaining to the management of national forest
20 lands.

21 12. Because Defendants' actions approving the Project violate several procedural and
22 substantive laws, a favorable decision by this Court will redress the actual and imminent injury to
23 Plaintiffs.

24 13. Both Plaintiffs participated in the administrative process culminating in the issuance of
25 Project Decision Notice and FONSI by submitting comments on the Preliminary Environmental
26 Assessment ("EA") for the Project. Defendants requested and received (from the Washington, D.C.
27 office of the Forest Service) an economic "emergency situation determination" (ESD) for the Project,
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1 which allows the agency to begin logging after the decision is signed, without any further public input
2 or process, such as an administrative appeal or objection. As such, Plaintiffs have exhausted all
3 available administrative remedies.

4 14. Defendant Dean Gould is the Forest Supervisor for the Sierra National Forest and is
5 being sued in his official capacity. Mr. Gould is directly responsible for forest management on the
6 Sierra National Forest and for ensuring that all resource management decisions comply with applicable
7 laws and regulations. Mr. Gould signed the Decision Notice for the Aspen Project challenged here. Mr.
8 Gould officially resides in Clovis area of California.

9 15. Defendant United States Forest Service is an agency of the United States Department of
10 Agriculture. The Forest Service is responsible for the administration and management of the federal
11 lands subject to this action, including the implementation of NEPA, NFMA, the APA, and the statutes'
12 implementing regulations.

13 14 **LEGAL BACKGROUND**

15 **A. The National Environmental Policy Act**

16 16. The National Environmental Policy Act (“NEPA”) is “our basic national charter for
17 protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA’s twin aims are to ensure that federal
18 agencies consider the environmental impacts of their proposed actions and to ensure that agencies
19 inform the public that environmental concerns have been considered.

20 17. NEPA requires “responsible [federal] officials” to prepare an environmental impact
21 statement (“EIS”) to consider the effects of each “major Federal action[] significantly affecting the
22 quality of the human environment.” 42 U.S.C. § 4332(2)(C)(i). Preparation of an EIS is mandated if
23 “substantial questions are raised as to whether a project . . . *may* cause significant degradation of some
24 human environmental factor.” *Center for Biological Diversity v. National Highway Traffic Safety*
25 *Administration*, 538 F.3d 1172, 1219-20 (9th Cir. 2008) (emphasis added). To determine whether the
26 impacts of a proposed action are significant enough to warrant preparation of an EIS, the agency may
27 first prepare an environmental assessment (“EA”). An agency must prepare an EIS for any action that
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1 has “individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7). A
2 cumulative impact is defined as “the impact on the environment which results from the incremental
3 impact of the action when added to other past, present, and reasonably foreseeable future actions
4 regardless of what agency . . . or person undertakes such other actions. Cumulative impacts can result
5 from individually minor but collectively significant actions taking place over a period of time.” *Id.* §
6 1508.7.

7 18. The EA must take a “hard look” at the impacts, and must not minimize adverse side
8 effects of the proposed action; if the agency decides the impacts are not significant, it must supply a
9 convincing statement of reasons why. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d
10 1208 (9th Cir. 1998); *Ocean Advocates v. United States Army Corps of Engineers*, 361 F.3d 846, 865
11 (9th Cir. 2003); *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147 (9th Cir. 2006). Further, if
12 significant new information or changed circumstances arise, the Forest Service must prepare a
13 supplemental EA or EIS. 40 C.F.R. § 1502.9(c); *Price Road Neighborhood Ass’n, Inc. v. U.S. Dept. of*
14 *Transp.*, 113 F.3d 1505, 1508-1509 (9th Cir. 1997). In the analysis of impacts, there must be a rational
15 connection between the facts found and the decision made. *Ocean Advocates v. United States Army*
16 *Corps of Engineers*, 361 F.3d 846, 865 (9th Cir. 2003); *Earth Island Institute v. U.S. Forest Service*,
17 442 F.3d 1147 (9th Cir. 2006).

18 19. Further, NEPA’s implementing regulations require that the agency “shall identify any
19 methodologies used and shall make explicit reference by footnote to the scientific and other sources
20 relied upon for conclusions,” and shall ensure the scientific accuracy and integrity of environmental
21 analysis. *Id.* § 1502.24. The agency must disclose if information is incomplete or unavailable and
22 explain “the relevance of the incomplete or unavailable information to evaluating reasonably
23 foreseeable significant adverse impacts.” *Id.* § 1502.22(b)(1). The agency must also directly and
24 explicitly respond to dissenting scientific opinion. *Id.* § 1502.9(b). Agencies must fully analyze a
25 reasonable range of alternatives and the purpose and need for projects cannot be arbitrarily narrow. *Id.*
26 § 1502.13, 1502.14.

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1 27. In November of 2013, the Sierra National Forest issued a scoping notice inviting public
2 comments on their proposal to conduct a post-fire logging project in the Aspen fire (Aspen Project),
3 and Plaintiffs submitted scoping comments in December of 2013.

4 28. In April of 2014, the Sierra National Forest issued a Preliminary Environmental
5 Assessment for the Aspen Project. Plaintiffs submitted detailed expert comments, and scientific
6 sources, during the comment period on the EA.

7 29. The EA for the Aspen Project states that the generation of revenue for the Forest
8 Service’s budget from the sale of timber from the Project area to private logging companies (since the
9 agency keeps the receipts from the sale of post-fire timber) is a primary purpose and need of the Project
10 (Aspen EA, p. 10). The Forest Service granted itself an economic “Emergency Situation
11 Determination” (ESD) to facilitate more rapid logging.

12 30. Post-fire forest provides essential habitat for many fire-dependent species, including the
13 rare Black-backed Woodpecker. This species depends upon recent moderately to severely burned forest
14 habitat, which creates a very high density of large “snags” or dead trees, for nesting and foraging
15 (generally at least 80 to 100 medium and large snags per acre across at least 100 to 300 acres per pair,
16 within post-fire habitat that is typically less than 8 to 10 years old).

17 31. In 2012 the Forest Service commissioned the preparation of a Conservation Strategy for
18 the Black-backed Woodpecker that would advise the Forest Service on what management activities in
19 burned forest would be compatible with the continued existence of this species. The Conservation
20 Strategy recommends, in part, as follows:

- 21 • “patches retained to support Black-backed Woodpeckers should incorporate areas with
22 the highest densities of the largest snags to provide foraging opportunities (see Siegel et
23 al. 2012b) as well as high density patches of medium- and small-diameter snags (see
24 Seavy et al. in press) in the interior of the fire area to support higher nesting success in
25 the early postfire years (see Saab et al. 2011)”;
- 26 • “focus on retaining large patches of predominately prey-rich trees as evidenced by
27 wood-boring beetle holes on trunks, or by using another appropriate index”;

- 1 • “post-fire clear-cut patches (where all the snags in an area are removed) should not
- 2 exceed 2.5 ha [6.18 acres](see Schwab et al. 2006)”;
- 3 • “Avoid harvesting fire-killed forest stands during the nesting season (generally May 1
- 4 through July 31). This management recommendation will protect dozens of other nesting
- 5 bird species associated with burned forests in addition to the Black-backed
- 6 Woodpecker.”

7 32. Blacked-backed Woodpeckers are currently residing in the Aspen project area.

8 33. The Aspen Project would eliminate about 38% of the estimated Black-backed

9 Woodpecker pairs (6.5 out of 17.1 projected pairs would be lost), and would remove about 41% of the

10 suitable Black-backed Woodpecker habitat (Aspen EA, p. 202).

11 34. The proportion of suitable Black-backed Woodpecker habitat that would be removed by

12 the Aspen Project is more than twice as high as the proportion (21%) removed on Forest Service lands

13 over the past several years. Aspen EA, p. 204.

14 35. In addition to eliminating thousands of acres of suitable and occupied Black-backed

15 Woodpecker habitat in the Project area, logging of suitable Black-backed Woodpecker habitat would

16 occur in the nesting season in 2015. Such action can potentially kill black-backed woodpecker chicks in

17 the nest before they can fly away, increases the chance of nest abandonment, inhibits population growth

18 of this species, and is contrary to the recommendations of the Forest Service’s own Conservation

19 Strategy for the Black-backed Woodpecker (Bond et al. 2012).

20 36. Monica Bond, the lead author of the Forest Service’s Conservation Strategy for the

21 Black-backed Woodpecker, criticized the Forest Service for permitting the logging of post-fire habitat

22 during Black-backed Woodpecker nesting season.

23 37. In responding to Monica Bond’s comments, the Aspen EA did not analyze the impacts

24 to the Black-backed Woodpecker from logging during nesting season.

25 38. The Aspen Project Response to Comments (p. 139), acknowledged that the Forest

26 Service’s Black-backed Woodpecker Conservation Strategy recommended, based upon the best

27 available science, avoiding all logging in suitable Black-backed habitat during nesting season, and

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1 acknowledged that nesting season extends through July 31st, and that 43% of suitable Black-backed
2 habitat would be logged, but then inexplicably concluded: “Based upon the lack of effects to black-
3 backed woodpecker habitat and nesting birds an additional alternative that limited harvests for black-
4 backed woodpecker habitat [to avoid nesting season] was considered unnecessary”.

5 39. The Black-backed Woodpecker subspecies occurring in the Sierra Nevada forests has
6 been petitioned for listing under the Endangered Species Act (ESA), and the U.S. Fish and Wildlife
7 Service (USFWS), on April 9, 2013, issued a determination that substantial scientific evidence had
8 been presented in the Petition sufficient to conclude that listing this species under the ESA “may be
9 warranted”, due to threats such as a deficit of habitat due to fire suppression and post-fire logging
10 (USFWS 2013).

11 40. On national forest lands, the Black-backed Woodpecker is the sole management
12 indicator species (MIS), or bellwether, for all wildlife species positively associated with high levels of
13 snags (standing fire-killed trees) in post-fire habitat.

14 41. The Aspen EA did not discuss the fact that the USFWS has determined that the Sierra
15 Nevada and eastern Oregon Cascades population of the Black-backed Woodpecker may need to be
16 listed under the ESA due in large part to post-fire logging, exacerbated by an overall scarcity of
17 suitable habitat, relative to historical (before the early 1900s) conditions, due to fire suppression
18 policies.

19 42. Current science also concludes that post-fire logging of one-third of suitable Black-
20 backed Woodpecker habitat will lead to a precipitous decline in populations and a trend toward
21 extinction over the next three decades (Odion and Hanson 2013).

22 43. The Aspen EA does not provide any explanation as to how the removal of well over
23 one-third of the suitable Black-backed Woodpecker habitat created by the Aspen fire does not represent
24 a serious threat to Black-backed Woodpecker populations.

25 44. In addition, the cumulative effects from the high proportion of removal of suitable
26 Black-backed Woodpecker habitat that would be destroyed by the Aspen Project (41%), particularly in
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1 combination with other reasonably foreseeable losses of habitat, such as in the Rim fire area, were also
2 not analyzed, or adequately analyzed, in the EA.

3 45. The Aspen EA thus failed to adequately address the direct impacts or cumulative effects
4 of their actions on the Black-backed Woodpecker, did not consider or adequately consider all relevant
5 factors or issue a convincing statement of reasons for the decision not to prepare an EIS, and failed to
6 adequately assess intensity factors in determining whether potentially significant adverse impacts
7 would occur from the Projects.

8 46. The California Spotted Owl is a rare raptor that the Forest Service has designated as a
9 Sensitive Species, meaning that the agency recognizes that there is reason for concern about the
10 population viability of this species. The Forest Service is required to maintain viable populations of
11 Sensitive Species, including the California Spotted Owl.

12 47. Long known for their association with dense, mature/old forest, spotted owls have, over
13 the past six years, been extensively studied in regard to burned forests. This recent research has found
14 that past assumptions about the relationship between owls and fire are not true. Not only are owls using
15 intensely burned forest, the most recent scientific evidence establishes that California Spotted Owls
16 *preferentially* select unlogged high-intensity fire areas in mature conifer forest for foraging (Bond et al.
17 2009, Bond et al. 2013).

18 48. The scientific research has also found that recent fires in the Sierras have not reduced
19 California spotted owl occupancy, and, in fact, spotted owl reproduction is higher in fire areas.

20 49. However, when post-fire logging of moderate/high-intensity fire areas occurs near or
21 adjacent to territory cores (such as PACs), multiple data sources indicate that occupancy is reduced
22 (Bond et al. 2009, Bond 2011, Lee et al. 2012).

23 50. Despite this, and more, new science as to the relationship between owls and fire, the
24 Forest Service, in the Aspen EA and Response to Comments, refers back to the 2004 Sierra Nevada
25 Framework to assert that burned forest can be ignored as owl habitat and impacts of post-fire logging
26 on the owls can likewise be ignored.

1 51. In the Aspen Project, the Forest Service re-mapped four Spotted Owl PACs and HRCAs
2 on the same basis, excluding areas of moderate/high-intensity fire and thus opening these areas to post-
3 fire logging while claiming no impacts to California Spotted Owls (Aspen EA, pp. 179-180).

4 52. The Aspen EA included a cursory admission that moderate/high-intensity fire areas
5 create suitable Spotted Owl foraging habitat (EA, p. 181), then failed to incorporate, in the impacts
6 analysis, the loss of suitable foraging habitat from post-fire logging in moderate/high-intensity fire
7 areas (Aspen EA, pp. 179-180).

8 53. In the assessment of adverse impacts to Spotted Owls, the Aspen Project flatly refused
9 to consider the new science that directly undermines the Forest Service's assumptions, and which
10 directly contradicts the agency's outdated studies (none of which actually investigated the relationship
11 between Spotted Owls and fire), regarding California Spotted Owls, stating: "Implementation of action
12 alternatives would not result in *any* additional reduction of habitat beyond what was caused by the
13 Aspen Fires", citing the 2004 Framework (Aspen Project Response to Comments, pp. 47, 142
14 [emphasis added]).

15 54. When Plaintiffs submitted new scientific information showing that the 2004
16 Framework's assumptions about suitable habitat are incorrect and outdated, the Forest Service simply
17 referred back to the 2004 Framework's definition of habitat suitability (Aspen Project Response to
18 Comments, pp. 171, 194). The Aspen Project Response to Comments (pp. 47-49, 60) quoted comments
19 regarding studies finding California Spotted Owls succeeding in unlogged mixed-severity fire areas
20 (Bond et al. 2013), and serious adverse effects to Spotted Owls from post-fire logging (Lee et al. 2012,
21 Clark et al. 2013), but offered no response to these studies. Likewise, the EA offers no response to
22 Bond et al. 2009's recommendation that "burned forests within 1.5 km of nests or roosts of California
23 spotted owls *not be salvage-logged* until long-term effects of fire on spotted owls and their prey are
24 understood more fully" (emphasis added). Thus, the EA fails to address adverse impacts to the suitable
25 habitat that Spotted Owls depend upon for the food they need to survive.

26 55. Not only does the most recent science demonstrate the importance of burned forest
27 habitat to spotted owls, surveys conducted by the Forest Service in 2014 confirm California spotted owl
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1 presence in the Aspen fire area in or near owl PACs and HRCAs that were re-mapped (*i.e.*, areas that
2 the Forest Service claimed are unsuitable, and now plans to log). Yet, logging is nonetheless proposed
3 to occur within 1.5 km of these owl survey locations, contrary to Bond et al. (2009).

4 56. The EA for the Project fails to adequately discuss or consider the best available data
5 indicating loss of Spotted Owl occupancy from post-fire logging. Data sources showing loss of Spotted
6 Owl occupancy after post-fire logging, which were submitted with Plaintiffs' comments, are simply not
7 addressed at all in the Project EA, Wildlife BE, or Response to Comments documents.

8 57. Also ignored in the Aspen EA is the fact that the most current, and best available,
9 science concludes that California spotted owl populations are declining (Conner et al. 2013, Tempel
10 and Gutierrez 2013, Tempel 2014). The Aspen Project EA (e.g., p. 166) refused to even acknowledge
11 the current science showing Spotted Owls are in decline on Forest Service lands.

12 58. When Plaintiffs submitted the 2013 and 2014 studies (demonstrating that California
13 Spotted Owl populations are indeed declining) to the Forest Service during comments, stating that this
14 new scientific information undermines outdated conclusions in the 2004 Framework, and outdated
15 citations in the EA, the Forest Service responded with text apparently cut and pasted from some 2012
16 document, which argued that the new data on population declines of California Spotted Owls (the 2013
17 and 2014 studies cited above, which were submitted with Plaintiffs' comments) was not yet published
18 (Aspen Project Response to Comments, p. 172). The Project EAs failed to adequately analyze this
19 science, or adequately disclose the impacts or cumulative effects of logging post-fire habitat on spotted
20 owls, including logging in moderate- and high-intensity fire areas within the pre-fire and post-fire
21 boundaries of PACs and HRCAs.

22 59. The conclusion of the Aspen EA (p. 196) that "the Project may affect individuals, but is
23 not likely to result in a trend toward Federal listing or loss of viability" of the California Spotted Owl is
24 not based upon an analysis of the adverse impacts of planned post-fire logging on suitable foraging
25 habitat created by moderate/high-intensity fire.

26 60. In summary, the Aspen EA and associated documents a) admitted that moderate/high-
27 intensity fire areas are preferred (best) foraging habitat for California Spotted Owls, b) did not dispute
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1 these findings or their reliability or reference any scientific data indicating that removal of foraging
2 habitat is of no consequence to the owls, c) refused to respond to or address in any way the multiple
3 scientific sources submitted by Plaintiffs showing that, when suitable foraging habitat created by high-
4 intensity fire is removed by post-fire logging, Spotted Owl occupancy is reduced—often dramatically,
5 and d) yet concluded, in the final analysis of impacts, that removal of suitable foraging habitat created
6 by moderate/high-intensity fire equates to zero removal of habitat and zero adverse impact to the owls.

7 61. The U.S. Forest Service’s Forest Service Manual (FSM), Amendment 2600-2005-1
8 (effective date: September 23, 2005), Section 2670.12, states: “Departmental Regulation 9500-4. This
9 regulation directs the Forest Service to: 1. Manage ‘habitats for all existing native and desired
10 nonnative plants, fish, and wildlife species in order to maintain at least viable populations of such spe-
11 cies.’” This requirement pertains with special force to Forest Service Sensitive Species, and Section
12 2670.22 states that following requirement for Sensitive Species: “Maintain viable populations of all
13 native and desired nonnative wildlife, fish, and plant species in habitats distributed throughout their
14 geographic range on National Forest System lands.” The Forest Service also must not take actions that
15 would contribute to a trend towards federal listing under the Endangered Species Act. FSM Section
16 2670.32. The Ninth Circuit Court of Appeals has held that, with regard to the Forest Service’s obliga-
17 tions under NEPA for Sensitive Species, the Forest Service must determine the quantity and quality of
18 habitat needed to maintain at least viable populations of the Sensitive Species, and must
19 determine whether the individual project being considered would push such habitat below the critical
20 threshold needed to maintain at least viable populations. *Ecology Center v. Austin*, 430 F.3d 1057,
21 1067-1068 (9th Cir. 2006), overruled on other grounds, *The Lands Council v. McNair*, 537 F.3d 981,
22 988, 990-994, 1001 (9th Cir. 2008) (*en banc*).

23 62. The Aspen EA failed to divulge the quantity and quality of habitat needed to maintain
24 viable populations of California Spotted Owls on the Sierra National Forest and range-wide, and failed
25 to divulge whether the Project would reduce such habitat below the critical threshold to maintain viable
26 populations.

1 63. The Aspen project is also within the range of the Pacific Fisher, an extremely rare,
2 mink-like mammal that the U.S. Fish and Wildlife Service has determined to be “warranted” for listing
3 under the federal Endangered Species Act (ESA), based upon the biological science and threats,
4 including logging. At that time (2004), listing was determined to be “precluded”, however, due to other
5 administrative priorities, but a new listing decision is expected in the fall of this year. *See* 78 Fed. Reg.
6 70104, 70117 (November 22, 2013) (“[The Fish and Wildlife Service] continue[s] to find that listing
7 this species is warranted but precluded as of the date of publication of this notice of review. However,
8 we are working on a proposed listing rule that we expect to publish prior to making the next annual
9 resubmitted petition 12-month finding.”).

10 64. The current science concludes that Pacific Fishers select dense, mature/old conifer forest
11 for suitable denning and resting habitat (Zielinski et al. 2006, Purcell et al. 2009), but areas of mature/
12 old conifer forest that experience moderate/high-intensity fire are suitable foraging habitat, with Fishers
13 using such areas at levels comparable to their use of unburned mature/old conifer forest (Hanson 2013).
14 Hanson (2013) concluded that moderate/higher-severity fire occurring in dense, mature/old conifer
15 forest creates suitable Fisher foraging habitat, and that post-fire logging would reduce or remove the
16 structural components and complexity that makes post-fire habitat suitable for Fishers.

17 65. The Aspen EA (pp. 183-184) cursorily mentioned Hanson (2013), but failed to
18 acknowledge that this study found Fisher use of moderate/high-intensity fire areas to equal that of
19 unburned old forest and that this post-fire habitat is suitable Fisher habitat, and failed to acknowledge
20 the conclusion of Hanson (2013) that post-fire logging would eliminate habitat suitability. On this
21 faulty basis, the Forest Service categorized moderate/high-intensity fire areas as unsuitable for Fishers
22 and based the impacts analysis on this assumption (Aspen EA, pp. 183-184)—even as the Aspen
23 Project Response to Comments (p. 62) acknowledges that Hanson (2013) found fishers preferentially
24 selecting mixed-severity fire areas over unburned forests and using moderate/higher-severity fire areas
25 at levels comparable to use of unburned old forest.

1 66. Both the Aspen EA and the Response to Comments fail to divulge that Hanson (2013)
2 also found a statistically significant positive selection for larger proportions of higher-severity fire area
3 by Pacific fishers, where higher-severity was defined as over 50% basal area mortality. The Aspen
4 Project Response to Comments erroneously claimed (p. 62) not to understand the higher-severity fire
5 definition used in Hanson (2013) (over 50% basal area mortality), despite the fact that this is the same
6 definition used by the Forest Service to evaluate the Aspen project (Aspen EA, pp. 96, 178). The Aspen
7 EA never addressed the actual findings of the study or considered these findings in assessing the true
8 impacts of this project on Fisher habitat and survival.

9 67. The conclusion of the Aspen EA (p. 196) that “the Project may affect individuals, but is
10 not likely to result in a trend toward Federal listing or loss of viability” of the Pacific Fisher is not
11 based upon an analysis of the adverse impacts of planned post-fire logging on suitable foraging habitat
12 created by moderate/high-intensity fire.

13 68. During scoping comments, and comments on the EA, Plaintiffs submitted detailed
14 expert comments, and scientific sources, demonstrating that after a fire the forest naturally regenerates,
15 *i.e.*, seeds from live trees within and around burned areas, and seeds buried under forest duff which did
16 not get burned sprout and grow, beginning the next phase in the cycle of life for a fire adapted
17 ecosystem. These scientific sources establish that substantial natural post-fire conifer regeneration
18 occurs in high-intensity fire patches, including in the interior of such patches (more than two mature
19 tree lengths into the patches), and that native shrubs do not preclude such conifer regeneration.

20 69. Plaintiffs also submitted data demonstrating that the one study which found relatively
21 little natural post-fire conifer regeneration in high-intensity fire patches (Collins and Roller 2013) was
22 conducted largely in areas that had been clearcut before or after the fires, and that the authors did not
23 divulge that conifer seed source had been removed prior to the fires in the studied areas. Neither of the
24 EA nor the Response to Comments documents acknowledged this information.

25 70. During scoping comments, and comments on the EA, Plaintiffs submitted detailed
26 expert comments, and scientific sources, demonstrating that, contrary to the Forest Service’s
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1 hypothetical modeling assumptions/scenarios, post-fire logging, artificial conifer planting, and shrub
2 removal does not, in fact, effectively prevent future high-intensity fire, and often *increases* fire
3 intensity potential instead (Donato et al. 2006, Thompson et al. 2007, McGinnis et al. 2010, Donato et
4 al. 2013).

5 71. In 2004, the Forest Service amended all forest plans in the Sierra Nevada management
6 region, including those of the Sierra and Tahoe National Forests, with the 2004 Sierra Nevada Forest
7 Plan Amendment (the “2004 Framework”). The 2004 Framework allows, among other things, up to
8 100% removal of snag forest habitat (complex early seral forest), elimination of all or a portion of
9 California Spotted Owl PACs and HRCAs if the majority of the area experiences high-intensity fire,
10 and post-fire logging of these portions of pre-fire PACs or HRCAs, based upon the assumption that
11 moderate and high-intensity fire areas do not comprise suitable California Spotted Owl habitat, and that
12 such fire effects eliminate habitat suitability for the owls, such that the logging of such areas will not
13 adversely affect the owls (USFS 2004). The 2004 Framework assumed that high-intensity fire is
14 unnaturally high currently in the Sierra Nevada and that it is causing substantial loss of occupancy.
15 Further, the 2004 Framework assumed that, due to fire suppression, Sierra Nevada forests are now
16 burning “almost exclusively” at high-intensity effects in areas that have missed natural fire return
17 intervals, and that high-intensity fire results in a loss of ecological integrity and threatens ecological
18 collapse.

19 72. Since 2004, significant new scientific information has arisen which has rendered invalid
20 the assumptions upon which the 2004 Framework EIS and Record of Decision were based, and
21 Plaintiffs submitted this new information to the Forest Service during comments on the Aspen Project.
22 This information includes but is not limited to the following: a) California spotted owls preferentially
23 select unlogged high-severity fire areas as suitable foraging habitat (Bond et al. 2009), and within
24 burned forest they select the areas with highest overall density/complexity in terms of total basal area
25 of trees (snags and live trees combined), indicating that high levels of standing snags in higher-severity
26 areas is important to California spotted owls (Roberts 2008); b) California spotted owl reproduction is
27 higher in unlogged mixed-severity fire areas than in unburned mature forest (Bond et al. 2002, Roberts
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1 2008); c) California spotted owl occupancy is slightly higher in mixed-severity fire areas (average of
2 32% high-severity fire effects) than in unburned mature forests in the Sierra Nevada, while occupancy
3 has been consistently lost in areas where “salvage” logging has removed post-fire habitat (Bond 2011,
4 Lee et al. 2012); d) in unlogged mixed-severity fire areas, California spotted owls have home range siz-
5 es that are comparable to or smaller than those in unburned mature forest (indicating comparable terri-
6 tory fitness and habitat suitability in burned forest) (Bond et al. 2013); e) the only area in the Sierra
7 Nevada in which California spotted owl populations are known to be stable or slightly
8 increasing is an area with an active mixed-severity fire regime and no mechanical thinning or post-fire
9 logging (Sequoia/Kings-Canyon National Park), while all study areas on national forests and private
10 lands (characterized by aggressive reduction of fire due to fire suppression, landscape-level mechanical
11 thinning, and common post-fire logging) have declining populations (Conner et al. 2013, Tempel and
12 Gutiérrez 2013, Tempel 2014); f) due to fire suppression policies, there is now a deficit of high-
13 intensity fire in the forests of the Sierra Nevada, and there is now only about one-fourth to one-half as
14 much high-intensity fire as there was prior to the early 20th century, depending upon the estimates
15 (Mallek et al. 2013, Baker 2014, Hanson and Odion 2014, Odion et al. 2014); g) high-intensity fire
16 creates complex early seral forest (a.k.a., “snag forest habitat”), which is one of the rarest, most
17 biodiverse and ecologically important, and most threatened of all forest habitat types (Burnett et al.
18 2010, Swanson et al. 2011, Odion et al. 2014); h) forests of the Sierra Nevada are burning mostly at
19 low/moderate-intensity currently, and this is also true of the most fire-suppressed forests (those that
20 have missed the most natural fire return intervals) (Odion and Hanson 2006, Odion and Hanson 2008,
21 van Wagendonk et al. 2012); i) due to fire suppression, we now have two to four times less high-
22 intensity fire than we did historically (Mallek et al. 2013, Hanson and Odion 2014, Odion et al. 2014),
23 and the most comprehensive analysis found that fire intensity is not increasing in the Sierra Nevada,
24 and that Forest Service analyses to the contrary were based upon demonstrable methodological errors
25 (Hanson and Odion 2014); j) due to the deficit of high-intensity fire from fire suppression, exacerbated
26 by post-fire logging, Black-backed Woodpeckers are now very rare in the Sierra Nevada, and there is
27 now a conservation concern about their populations, leading the Forest Service to produce a
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1 Conservation Strategy for this species (Bond et al. 2012); k) Black-backed Woodpeckers strongly
2 select large patches (generally at least 100-200 acres per pair) of recent moderate to high-intensity fire
3 occurring in areas of pre-fire dense, mature/old conifer forest, indicating that maintaining such fire
4 effects and habitat conditions are important for the conservation of this species (Hanson and North
5 2008, Siegel et al. 2013); l) a recent study concluded that current forest management, including
6 removal of one-third or more of Black-backed Woodpecker habitat through post-fire logging, would
7 cause a precipitous decline in Black-backed Woodpecker populations over the next three decades in the
8 Sierra Nevada and eastern Oregon Cascades, creating a substantial risk of extinction (Odion and Han-
9 son 2013); and m) Pacific Fishers actively use areas of unlogged moderate/high-intensity fire occurring
10 in pre-fire dense, mature/old conifer forest—at levels comparable to their use of unburned old forest—
11 and preferentially select mixed-intensity fire areas over unburned forest when they are near fire edges.

12 73. The Forest Service continues to manage national forests of the Sierra Nevada under the
13 assumptions of the 2004 Framework, despite the significant new information that has arisen over the
14 past decade. Brushing aside the large amount of new science submitted by Plaintiffs—science which
15 shows that the 2004 Framework’s conclusions and assumptions are inaccurate and outdated—the
16 Forest Service, replied: “The 2004 SNFPA decision has not been vacated by the courts and the deci-
17 sion, with its standards and guidelines, remains in effect. The Aspen project is in compliance with the
18 2004 Framework decision and its standards and guidelines.” Aspen Project Response to Comments, p.
19 176.

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21 **CLAIMS FOR RELIEF**

22 **FIRST CLAIM FOR RELIEF**

23 **Violation of NEPA and the APA**

24 **Failure to Prepare an Environmental Impact Statement**

25 74. Plaintiffs incorporate by reference all preceding paragraphs.

26 75. Based on the evidence in the record, the Aspen Project will likely have significant
27 adverse impacts and cumulative effects to California Spotted Owls (a designated Sensitive Species),
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1 and Black-backed Woodpeckers and the habitat type and suite of species which they represent. The
2 record also indicates that the Aspen Project would have significant or potentially significant adverse
3 impacts on Pacific Fishers—a Candidate Species under the ESA. Further, the Forest Service has failed
4 to provide a convincing statement of reasons to support their decision not to prepare an EIS.

5 76. Defendants’ decision to implement the Aspen Project without preparing an
6 Environmental Impact Statement, and without articulating a convincing statement of reasons for the
7 decision not to prepare an EIS, violates NEPA and its regulations (40 C.F.R. § 1508.27) and was
8 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA. 5
9 U.S.C. § 706(2).

10 **SECOND CLAIM FOR RELIEF**

11 **Violation of NEPA and the APA**

12 **Significant New Information and Failure to Supplement the 2004 Framework**

13 77. Plaintiffs incorporate by reference all preceding paragraphs.

14 78. Defendants’ Aspen EA relies on aspects of the 2004 Framework which have been
15 rendered outdated and invalid due to significant new scientific information and changed circumstances.
16 For example, new science demonstrates that many of the assumptions in the 2004 Framework are not
17 scientifically valid, and yet the Forest Service relies on those assumptions instead of making the
18 required changes to their outdated Forest Plan, or adapting their management on site specific projects to
19 reflect this new information.

20 79. Defendants’ failure to prepare a supplemental EIS to the 2004 Framework, as required
21 by the NEPA, and NEPA’s implementing regulations, 40 C.F.R. § 1508.9(c), represent agency action
22 which is arbitrary, capricious, an abuse of discretion, in excess of statutory authority and limitations,
23 and not in accordance with the law and procedures required by law. 5 U.S.C. § 706 (2).

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THIRD CLAIM FOR RELIEF

Violations of NEPA and the APA

Failure to Take a Hard Look, To Adequately Explain Impacts, To Provide Necessary Information, To Ensure Scientific Integrity, To Respond to Dissenting Scientific Opinion, and To Articulate a Reasonable Purpose and Need

80. Plaintiffs incorporate by reference all preceding paragraphs.

81. Pursuant to NEPA, Defendants must take a “hard look” at the consequences, environmental impacts, and adverse effects, including cumulative effects, of proposed actions. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9. Further, the Forest Service must adequately explain its impacts assessment, provide any necessary information for understanding and evaluating its decisions, ensure scientific accuracy and integrity in NEPA documents, and must also clearly divulge its methodologies for key findings, articulate a purpose and need which is not unreasonably narrow, and respond directly to dissenting scientific opinion. *Id.* § 1502.1, 1502.9, 1502.24.

82. The Forest Service failed to analyze, or adequately analyze, impacts and cumulative effects of the Aspen Project with regard to California Spotted Owls, Black-backed Woodpeckers, and Pacific Fishers.

83. Defendants’ decision to implement the Project without taking the requisite “hard look” at environmental impacts and cumulative effects, without ensuring scientific accuracy and integrity, without adequately explaining the impacts assessment, without providing necessary information, without articulating a reasonable purpose and need, and without adequately disclosing methodologies or directly responding to dissenting science with regard to California Spotted Owls, Black-backed Woodpeckers, and Pacific Fishers, violates NEPA and its regulations, and was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA. 5 U.S.C. § 706(2).

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FOURTH CLAIM FOR RELIEF

Violation of NFMA and the APA

Failure to Consider the Best Available Science

84. Plaintiffs incorporate by reference all preceding paragraphs.

85. Defendants' Aspen EA failed to carefully consider the best available science with regard to California Spotted Owls, Black-backed Woodpeckers, and Pacific Fishers, and the science on these subjects submitted by Plaintiffs to the Forest Service directly undermines the Forest Service's conclusions/assumptions, and/or shows the Forest Service's studies or positions to be outdated or flawed.

86. Defendants' failure to consider the best available science with regard to California Spotted Owls, Black-backed Woodpeckers, and Pacific Fishers, as required by the NFMA, and NFMA's implementing regulations, 36 C.F.R. § 219.35(a), is arbitrary, capricious, an abuse of discretion, in excess of statutory authority and limitations, and not in accordance with the law and procedures required by law. 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

1. Declare that Defendants violated NEPA, NFMA, the APA, and implementing regulations, in preparing and approving the Aspen Project EA, Decision Notice, and FONSI;

2. Declare that there exists significant new information rendering the 2004 Framework outdated and obsolete with regard to wildlife relationships with fire, and necessitating the preparation of a supplemental EIS;

3. Enjoin Defendants from awarding or implementing the Project, except for felling of hazard trees that could otherwise fall on and hit roads maintained for public use, trails or administrative structures, until Defendants have complied with NEPA, NFMA, the APA, and implementing regulations;

