

Law Offices of Babak Naficy

Babak Naficy (SBN 177709)

babaknaficy@sbcglobal.net

890 Monterey Street, Suite H

San Luis Obispo, CA 93401

Telephone: (805) 593-0926

Facsimile: (805) 593-0946

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

FRIENDS OF THE BIG BEAR VALLEY, a nonprofit association;
JOHN MUIR PROJECT OF EARTH ISLAND INSTITUTE, a nonprofit corporation; **SAN BERNARDINO VALLEY AUDUBON SOCIETY**, a nonprofit corporation,

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture; **FREDDIE DUNCAN**, District Ranger, Mountaintop Ranger District, San Bernardino National Forest, in his official capacity,

Defendants

Case No.: 5:23-cv-1609

COMPLAINT FOR VACATUR, INJUNCTIVE, AND DECLARATORY RELIEF

Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*; National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*

JURISDICTION AND VENUE

1
2 1. This Court has jurisdiction over this action pursuant to 28
3 U.S.C. § 1331 (federal question) and 28 U.S.C. § 2412 (costs and fees).
4 Plaintiffs seek judicial review of final agency actions of the United
5 States Forest Service, as defined by the Administrative Procedure Act
6 (“APA”), 5 U.S.C. § 704 (actions reviewable).
7

8
9 2. Venue is properly rested in this Court pursuant to 28 U.S.C.
10 § 1391(e)(1) because the events or omissions giving rise to the claims
11 occurred in this district, primarily in San Bernardino County.
12
13

INTRODUCTION

14
15 3. Plaintiffs Friends of Big Bear Valley, John Muir Project of
16 Earth Island Institute, and San Bernardino Valley Audubon Society
17 (collectively “Plaintiffs”) challenge Defendant United States Forest
18 Service’s (“USFS”) Decision Notice/Finding of No Significant Impact
19 (“DN/FONSI”) approving the North Big Bear Landscape Restoration
20 Project (“North Big Bear Project” or “Project”). Defendant Freddie
21 Duncan (“Duncan” or collectively with USFS “Defendants” or “Forest
22 Service”) signed the DN/FONSI on May 1, 2023. Plaintiffs bring this
23 challenge on the grounds that the DN/FONSI (1) violates the National
24 Environmental Policy Act (“NEPA”) and its implementing regulations,
25
26
27
28

1 (2) violates the USFS's objection regulations, and (3) violates the
2 National Forest Management Act ("NFMA") and its implementing
3 regulations.
4

5 4. According to the Forest Service, the stated purpose of the
6 Project is to curb wildfire behavior to protect adjacent human
7 communities, while improving forest health and wildlife habitat, by
8 removing many trees in forests which the Forest Service asserts are
9 unnaturally and excessively dense.
10
11

12 5. To accomplish the stated goal, the Project as approved will
13 involve a significant amount of "fuel reduction," which is a euphemism
14 for tree and vegetation removal by means of prescribed burns as well as
15 mechanical and/or hand removal of trees and other vegetation. The
16 Environmental Assessment ("EA") and other Project documents do not
17 clearly state what the Forest Service intends to do with the thousands
18 of trees that they propose to cut down, including whether the Forest
19 Service plans to skin and haul the logs with industrial ground-based
20 logging machinery. The EA also fails to describe the soil and vegetation
21 impacts associated with such activities.
22
23
24
25
26

27 6. Prescribed fires are intentionally set fires that are planned,
28 managed, and monitored for temperature, humidity, wind, vegetative

1 moisture, and smoke dispersal by the Forest Service. Prescribed fires
2 also include “broadcast burning” which is the process of setting fire to
3 most or all of an area within well-defined boundaries for the stated
4 purpose of reducing fuel hazards and managing biological resources, or
5 both. The Project documents state that the Project activities, including
6 widespread tree cutting, ground disturbance, and prescribed fires
7 adjacent to homes would occur over the duration of 15 to 20 years (EA,
8 p. 22) on more than 13,000 acres of forest. Yet the Forest Service claims
9 Project implementation will not result in any potentially significant
10 impacts. Recently, the Forest Service has acknowledged that the
11 agency’s prescribed fires, including broadcast burns and pile burning
12 (i.e., burning of branches on the ground after thinning), has caused
13 multiple escapes of such prescribed fires, which in turn has led to the
14 destruction of large portions of adjacent human communities.
15
16
17
18
19
20

21 7. According to the DN/FONSI, an area of at least 1,200 acres
22 but not to exceed 2,000 acres would be subject to prescribed burns
23 annually within the proposed action area, adjacent to human
24 communities. The burns would occur in 100-to-600-acre blocks as a
25 daily prescribed burn during appropriate seasons. Prescribed burns
26 adjacent to riparian areas would be conducted within a 500-foot buffer
27
28

1 when vegetation fuel contains high moistures levels to protect willows
2 or other riparian shrubs and trees. Each of the project area watersheds
3
4 would be subject to prescribed burns up to 1,000 acres every 3 years.

5 8. The Project's proposed fuels management also includes
6
7 vegetation thinning in the form of timber removal using mechanical and
8
9 hand thinning techniques. "Forest thinning" reduces the number of
10
11 trees by cutting and removing them from the forest. The Forest
12
13 Service's theory justifying this activity is that reducing the number of
14
15 trees could result in lower intensity wildfires or prescribed burns and
16
17 ultimately reduce wildfire risk.

18 9. The Forest Service proposes to cut and remove trees using
19
20 heavy equipment such as bulldozers, cranes, and woodchippers, a
21
22 process which would result in soil disturbance and compaction. Tree
23
24 removal activities would also include crews using chainsaws, rakes, and
25
26 manually removing forest debris from the Project area.

27 10. Vegetation thinning within riparian conservation areas
28
29 ("RCA") could reduce riparian ground cover, e.g., rocks, stumps,
30
31 branches, leaves, litter, duff, and living plants less than 5 feet tall, by
32
33 up to 30 percent of naturally occurring cover within the Project area.
34
35 The total vegetation thinning in watersheds within the Project area

1 would include up to 600 acres of mechanical thinning every 5 years. It is
2 not clear if nonmechanical thinning or vegetation removal can exceed
3 this limit.
4

5 11. Through these efforts, the Forest Service purports to restore
6 forests within the Project area to pre-settlement conditions and thereby
7 curb fire behavior, despite highly controversial and uncertain evidence
8 and impacts, including: (1) the controversy surrounding the purported
9 evidence that pre-settlement forests were much less dense than today's
10 conditions, including the fact that the Forest Service's own evidence
11 shows that current forests in the North Big Bear Project area are
12 substantially less dense, not more dense, than historical forests; (2) the
13 controversy created by the existence of abundant scientific evidence
14 (submitted to the Forest Service by Plaintiffs during the comment
15 period), including studies by Forest Service scientists, which concluded
16 that forest fires are driven mainly by weather and climate factors and
17 that mechanical thinning changes the microclimate of forests, creating
18 hotter, drier, windier conditions, and promoting the growth and spread
19 of highly combustible invasive grasses, all of which tends to increase
20 rather than decrease the rate of spread and overall severity in fires; (3)
21 the controversy created by the existence of abundant scientific evidence
22
23
24
25
26
27
28

1 from scientists, including the Forest Service's own scientists, concluding
2 that thinning and other vegetation management in forests distant from
3 homes does not stop fires from reaching communities and in fact often
4 makes fires spread faster toward communities, thus increasing threats
5 to public safety, while defensible space pruning (not logging) within 100
6 or 200 feet of private properties is highly effective in protecting homes
7 and lives; (4) the controversy created by the potential for fires set by the
8 Forest Service to escape and destroy nearby communities; and (5) the
9 controversy regarding the adverse impacts that the Project would have
10 on an established Bald Eagle nest location, as pointed out by the over
11 1,000 comments submitted by the public expressing deep concern
12 regarding the degradation of habitat and noise disturbance impacts of
13 the Project to nationally famed Bald Eagles within the Project area,
14 including areas used by Bald Eagles far from the nest site.

15
16
17
18
19
20
21 12. The last time the San Bernardino National Forest pursued
22 the same approach represented by the North Big Bear Project was in
23 the early to mid-2000s, prior to the Grass Valley wildfire of 2007. This
24 fire rapidly swept through the areas that had been thinned and burned
25 down 199 homes—an outcome that the Forest Service's own scientists
26 blamed on the agency's failure to focus on the homes and the immediate
27
28

1 vicinity adjacent to homes, as opposed to distant forest wildlands. In its
2 Response to Comments document, the Forest Service ignored this
3
4 evidence and the importance of pursuing the activities known to
5 actually protect public safety from fires, dismissively rejecting
6
7 consideration of this science by disingenuously claiming that focusing
8 on the safety of adjacent communities is “beyond the scope” of the
9 Forest Service’s consideration (EA, App. C (Response to Comments) at
10 p. 9). Furthermore, the North Big Bear Project EA and associated
11 documents and reports did not meaningfully or adequately address the
12 potential for the Project to increase the risk to public safety from
13 wildfires or prescribed fires set by the Forest Service adjacent to
14 communities, and the potential for escape of such fires toward homes.
15
16
17

18 13. The Forest Service’s analysis of the impacts from this Project
19 and the decision to approve the Project based on an EA violates NEPA
20 and established Ninth Circuit precedent by, among other things, failing
21 to prepare an Environmental Impact Statement (“EIS”) in the face of a
22 highly controversial debate about the fire outcomes resulting from
23 mechanical thinning. BARK v. U.S. Forest Service, 958 F.3d 865 (9th
24 Cir. 2020).
25
26
27
28

1 14. In order to prevent the Forest Service from logging in ways
2 that will increase fire threats to adjacent human communities, degrade
3 forests that provides essential wildlife habitat, and result in violations
4 of the Forest Service's duties under NEPA, Plaintiffs seek from this
5 Court an order and judgment:
6
7

- 8 a. Declaring that the Forest Service's DN/FONSI for the
9 Project violates NEPA, 42 U.S.C. § 4321, et seq., and is
10 arbitrary, capricious, an abuse of discretion, and/or not in
11 accordance with law under the APA, 5 U.S.C. § 706(2)(A);
12
13 b. Vacating and setting aside the Forest Service's
14 DN/FONSI as an illegal agency action under the APA;
15
16 c. Permanently enjoining the Forest Service from
17 implementing the North Big Bear Project until the agency
18 complies with NEPA, USFS Objection regulations, and
19 NFMA;
20
21 d. Enter appropriate injunctive relief to ensure that
22 Defendants comply with NEPA and specifically to ensure
23 that Defendants and their agents take no further actions
24 toward proceeding with the challenged Project until they
25 have complied with NEPA;
26
27
28

- 1 e. Awarding Plaintiff its reasonable attorneys' fees and costs
2 pursuant to the Equal Access to Justice Act, 28 U.S.C. §
3 2412; and
4
5 f. Awarding such further relief as the Court deems just and
6 equitable.
7

8 **PARTIES**

9
10 15. Plaintiff JOHN MUIR PROJECT is a private organization
11 with a longstanding interest in the protection of national forests. John
12 Muir Project is a project of the EARTH ISLAND INSTITUTE ("EII"),
13 which is a nonprofit corporation organized under the laws of the State
14 of California. EII is headquartered in Berkeley, California. EII's mission
15 is to develop and support projects that counteract threats to the
16 biological and cultural diversity that sustains the environment.
17 Through education and activism, these projects promote the
18 conservation, preservation, and restoration of the earth. One of these
19 projects is the John Muir Project, whose mission is to protect all federal
20 public forestlands from commercial exploitation that undermines and
21 compromises science-based ecological management. The John Muir
22 Project offices are located in San Bernardino County, California. EII is a
23 membership organization with over 15,000 members in the United
24
25
26
27
28

1 States, over 3,000 of whom use and enjoy the National Forests of
2 California for recreational, educational, aesthetic, spiritual, and other
3
4 purposes.

5 16. The John Muir Project and EII's members include
6
7 individuals who regularly use public lands throughout the San
8 Bernardino National Forest—and specifically Mountaintop District—
9
10 for scientific study, recreational enjoyment, aesthetic beauty, and
11 nature photography. These members' interests will be irreparably
12
13 harmed by the planned logging because they will no longer be able to
14
15 scientifically study these areas in their current state, take nature
16
17 photographs of the area in its current state, or enjoy the aesthetic
18
19 beauty of the unlogged forest habitat and its inhabitants.

20 17. Plaintiff FRIENDS OF BIG BEAR VALLEY (“Friends”) is a
21
22 non-profit association whose headquarters are in Fawnskin, California,
23
24 on the south side of Big Bear Lake. Friends is actively involved in
25
26 species and habitat protection issues in and around Big Bear Lake and
27
28 has more than 11,000 members and over 850,000 followers/subscribers,
including many members who reside and recreate in and around Big
Bear Lake. One of Friends' primary missions is to protect and restore

1 habitat and populations of imperiled species, including from the
2 impacts of forest management practices that harm the environment.
3

4 18. Friends' members and staff include individuals who
5 regularly use and intend to continue to use the San Bernardino
6 National Forest, specifically Mountaintop District. These members and
7 staff use the area for observation, research, aesthetic enjoyment,
8 spiritual practice, and other recreational, scientific, spiritual, and
9 educational activities. Friends' staff and members use the area to enjoy
10 its character and to observe or study species, including the Bald Eagle,
11 which inhabits the area and/or uses it for foraging. These members'
12 interests will be irreparably harmed by the planned logging in the
13 Project area because they will neither be able to visit and enjoy this
14 area in its current state any longer, nor be able to observe or attempt to
15 observe the species which use and are dependent on these areas in their
16 current state.
17
18
19
20
21
22

23 19. Plaintiff SAN BERNARDINO VALLEY AUDUBON
24 SOCIETY ("SBVAS") is a nonprofit corporation organized under the
25 laws of the State of California. SBVAS, with a membership of over
26 1,700, strives to bring people to their natural environment. Focusing on
27 birds and other wildlife, they hope to conserve natural resources in the
28

1 Southern California's "Inland Empire," specifically San Bernardino,
2 Riverside, and Imperial Counties. Founded in 1948, SBVAS is
3
4 southeastern California's leading non-profit engaging people in the
5 conservation of birds and their habitats. SBVAS involves people
6
7 through recreational birding, education programs, and conservation
8 actions from counting birds to working with local, state, and national
9
10 policy makers.

11 20. This suit is brought by Friends, the John Muir Project of EII,
12 and SBVAS on behalf of themselves and their adversely affected
13
14 members and staff. Plaintiffs have an organizational interest in the
15 proper and lawful management of the San Bernardino National Forest,
16
17 specifically Mountaintop District. Plaintiffs' and their members' present
18 and future interests in the use of the Mountaintop District area are and
19
20 will be directly and adversely affected by the challenged decision. Those
21
22 adverse effects include, but are not limited to: (1) endangering public
23 safety from wildfires and prescribed fires; (2) harm to iconic Bald Eagle
24 nest and foraging and roosting sites; (3) harm to wildlife, including
25
26 protected species, and degradation of their habitats within and around
27
28 the Project area from proposed fuel reduction activities; (4) reduction
and impairment of recreation opportunities; (5) impaired spiritual and

1 aesthetic values of forest lands, trails, and landscapes caused by
2 Defendants' tree and vegetation removal and related activities; and (6)
3 loss of scientific investigation and observation opportunities with regard
4 to wildlife in areas proposed for logging. In addition, Plaintiffs and their
5 members and staff have an interest in ensuring that Defendants comply
6 with all applicable laws, regulations, and procedures pertaining to the
7 management of national forest lands. These are actual, concrete injuries
8 caused by Defendants' failure to comply with mandatory duties under
9 NEPA, NFMA, and other federal laws. Because Defendants' actions
10 approving the Project violate the law, a favorable decision by this Court
11 will redress the actual and imminent injury to Plaintiffs.
12
13
14
15
16

17 21. Plaintiffs have participated extensively in administrative
18 actions to protect their interests within the San Bernardino National
19 Forest. Friends, John Muir Project, and SBVAS actively participated in
20 the administrative review process by submitting substantive comments
21 and objections. The Plaintiffs have exhausted any and all available
22 administrative remedies.
23
24
25

26 22. Pursuant to 5 U.S.C. §§ 702 and 704, a reviewable final
27 agency action exists and is subject to this Court's review.
28

1 23. Defendant FOREST SERVICE is an agency of the United
2 States and is a division of the Department of Agriculture charged with
3 managing the public lands and resources of the San Bernardino
4 National Forest in accordance with NEPA and NFMA and their
5 implementing regulations.
6

7
8 24. Defendant FREDDIE DUNCAN, District Ranger for
9 Mountaintop Ranger Districts, approved the North Big Bear Landscape
10 Restoration Project in the San Bernardino National Forest and signed
11 the DN/FONSI. The DN/FONSI is the Forest Service’s final agency
12 action regarding the North Big Bear Landscape Restoration Project.
13
14

15 25. Defendant Duncan is sued only in his official capacity.
16

17 **STATUTORY AND REGULATORY FRAMEWORK**

18 **National Environmental Policy Act (42 U.S.C. § 4321, *et seq.*)**

19
20 26. Congress enacted the National Environmental Policy Act
21 (“NEPA”) in 1969. NEPA’s primary purposes are to ensure fully
22 informed decision-making and to provide for public participation in
23 environmental analysis and decision-making. 40 C.F.R §§ 1500.1(b) &
24 (c). To this end, NEPA directs all federal agencies to assess the
25 environmental impacts of proposed actions that significantly affect the
26 quality of the human environment.
27
28

1 27. The Council on Environmental Quality (“CEQ”) promulgates
2 uniform regulations to implement NEPA. These regulations are binding
3 on all federal agencies and can be found at 40 C.F.R. §§ 1500–1518.4.
4

5 28. The CEQ regulations require federal agencies to adopt
6 procedures to implement NEPA that supplement the CEQ regulations.
7 40 C.F.R. § 1507.3. The USFS’s NEPA procedures can be found at 36
8 C.F.R. §§ 220.1–220.7.
9
10

11 29. NEPA requires all federal agencies to prepare a “detailed
12 statement,” referred to as an Environmental Impact Statement (“EIS”),
13 assessing the environmental impacts of all “major Federal actions
14 significantly affecting the quality of the human environment.” 42 U.S.C.
15 § 4332(C).
16
17

18 30. Alternatively, an agency may instead prepare an
19 Environmental Assessment (“EA”) to help determine whether or not a
20 proposed activity will significantly affect the quality of the human
21 environment. An EA is “a concise public document for which a federal
22 agency is responsible.” 40 C.F.R. § 1508.9(a). The EA needs to include
23 sufficient evidence and analysis in order to determine whether an EIS
24 or a Finding of No Significant Impact (“FONSI”) is required. 40 C.F.R. §
25 1508.9, *see also* 36 C.F.R. § 220.7(b)(3)(i).
26
27
28

1 31. The scope of NEPA’s review of environmental effects is
2 broad; the agency must consider direct, indirect, and cumulative effects.
3
4 40 C.F.R. § 1508.8 (defining the term “effects” and explaining that it
5 includes indirect effects and is synonymous with “impacts”). Effects
6 include consideration of impacts on “ecological (such as the effects on
7 natural resources and on the components, structures, and functioning of
8 affected ecosystems), aesthetic, historic, cultural, economic, social, or
9 health” interests. *Ibid.*

12 32. Under USFS’s applicable NEPA regulations, the approval of
13 the North Big Bear Project triggered NEPA requirements, and the need
14 to prepare an EA, at least initially, and ultimately an EIS. 36 C.F.R. §
15 220.7(a).

18 33. Agency actions taken pursuant to NEPA are reviewable by
19 this Court under the APA. 5 U.S.C. §§ 702, 704, & 706.

21 *EA Requirements*

22 34. All EAs must include (1) a description of the need for the
23 project, (2) a description of the proposed action and alternative(s), (3) a
24 discussion of the environmental impacts of the proposed actions and
25 alternative(s), and (4) a note of the agencies and persons who were
26 consulted throughout the process. 36 C.F.R. § 220.7(b). Importantly, an
27
28

1 EA needs to “provide sufficient evidence and analysis for determining
2 whether to prepare an [EIS] or a [FONSI]”. 40 C.F.R. § 1508.9(a)(1).

3
4 Public scrutiny is essential to implementing NEPA. 40 C.F.R. §
5 1500.1(b). NEPA requires agencies to make diligent efforts to involve
6 the public in preparing and implementing their NEPA procedures. 40
7 C.F.R. § 1506.6(a). NEPA procedures ensure that environmental
8 information will be made available to public officials and citizens before
9 decisions are made and actions are taken. 40 C.F.R. § 1500.1(b).

10
11
12 35. NEPA requires that all agencies “study, develop, and
13 describe appropriate alternatives to recommend courses of action.” 42
14 U.S.C. § 4332(2)(E). This requirement “extends to all such proposals,
15 not just . . . [environmental] impact statements.” 40 C.F.R. § 1507.2(d).

16
17 The EA shall also provide sufficient evidence and analysis of the
18 environmental impacts of the proposed action, as well as the
19 alternative(s). 36 C.F.R. § 220.7(b)(3)(i).

20
21
22 36. NEPA requires agencies to take a hard look at the
23 environmental consequences before taking a major action. This includes
24 considering all foreseeable direct and indirect impacts, as well as
25 cumulative impacts.
26
27
28

1 37. To determine the significance of a federal action, CEQ
2 regulations require agencies to look to both the context and intensity of
3 the action. 40 C.F.R. § 1508.27. Context refers to the significance of the
4 action in regards to society as a whole, the affected region, the affected
5 interests, and the locality. Both short- and long-term effects are
6 relevant to the action’s context. 40 C.F.R. § 1508.27(a). The intensity of
7 the action is evaluated based on several factors, including, but not
8 limited to, the degree to which the possible effects on the human
9 environment are highly controversial or uncertain or involve unknown
10 characteristics or risks, the degree to which the action may establish a
11 precedent for future actions with significant effects or represents a
12 decision in principle about a future consideration, whether the action is
13 related to other actions with individually insignificant but cumulatively
14 significant impacts, and the degree to which an action may adversely
15 affect an endangered or threatened species or its habitat that has been
16 determined to be critical under the Endangered Species Act. 40 C.F.R. §
17 1508.27(b). “Significance exists if it is reasonable to anticipate a
18 cumulatively significant impact on the environment.” 40 C.F.R. §
19 1508.27(b)(7).

1 38. Accurate scientific analysis is essential to NEPA
2 implementation. 40 C.F.R. § 1500.1(b).

3
4 39. NEPA documents need to be written in plain language so
5 that decisionmakers and the public can readily understand them.
6 Documents are unacceptable if they are indecipherable to the public.

7
8 40. After completing an adequate EA, the agency shall prepare
9 either an EIS or a FONSI. An agency must prepare an EIS when it
10 makes a determination that the action has the potential to significantly
11 affect the natural or human environment. 36 C.F.R. § 220.6(c).

12
13 41. A FONSI will be prepared if the action causes no significant
14 effect to the environment; but the agency must provide a convincing
15 statement of reasons to explain how the impacts are insignificant. 40
16 C.F.R. § 1508.13.

17
18
19
20 ***United States Forest Service Project-Level Predecisional***
21 ***Administrative Review Process Regulations (36 C.F.R. Pt. 218)***

22
23 42. The USFS provides regulations establishing a predecisional
24 administrative review (also known as objection) process for proposed
25 actions of USFS projects. 36 C.F.R. § 218.1.

26
27 43. Objections are written documents seeking predecisional
28 administrative review of a proposed project implementing a land

1 management plan that are documented with an EA. They can be filed
2 by those who have submitted written comments to the specific project
3 during the commenting opportunity. 36 C.F.R. § 218.2.

4
5 44. These regulations note that certain projects are subject to
6 legal notice and the opportunity to comment; among these are projects
7 for which a revised EA is prepared based on consideration of new
8 information or changed circumstances. 36 C.F.R. § 218.22(d). This not
9 only provides the public with an opportunity to comment but ensures
10 that the right to file an objection is maintained for those who comment.
11 36 C.F.R. § 218.5.

12
13
14
15 ***Administrative Procedure Act (5 U.S.C. § 551 et seq.)***

16
17 45. Section 702 of the APA provides a private cause of action to
18 any person “suffering legal wrong because of agency action, or adversely
19 affected or aggrieved by agency action within the meaning of a relevant
20 statute.” 5 U.S.C. § 702.

21
22
23 46. Under section 704 of the APA, only “final agency actions” are
24 reviewable. 5 U.S.C. § 704. A final agency action is one that marks the
25 consummation of the agency’s decision-making process and one by
26 which rights or obligations have been determined or from which legal
27 consequences flow. Bennett v. Spear, 520 U.S. 154, 177-78 (1997).
28

1 47. Under section 706 of the APA, a court must “hold unlawful
2 and set aside agency action, findings, and conclusions found to be . . .
3 arbitrary, capricious, an abuse of discretion, or otherwise not in
4 accordance with law.” 5 U.S.C. § 706(2). In reviewing an agency's
5 finding that a project has no significant effects, courts must determine
6 whether the agency has met NEPA's hard look requirement, “based [its
7 decision] on a consideration of the relevant factors, and provided a
8 convincing statement of reasons to explain why a project's impacts are
9 insignificant.” BARK v. United States Forest Service, 958 F.3d 865, 869
10 (9th Cir. 2020).

15 **SUMMARY OF PERTINENT FACTS**

16 48. As explained in the June 2023 Final EA, the Forest Service
17 claims that implementation of the Project will:
18

- 19 1) Reduce risks to firefighters, communities, infrastructure,
20 air quality, and watershed integrity due to
21 uncharacteristically large or severe wildfires;
- 22 2) Reduce fire behavior directly adjacent to communities and
23 infrastructure to prevent undesirable fire effects;
- 24 3) Restore historic fire patterns and frequencies at the
25 landscape scale and minimize the potential for
26 landscape scale and minimize the potential for
27 landscape scale and minimize the potential for
28 landscape scale and minimize the potential for

1 uncharacteristically large or severe wildfires, or
2 vegetation type conversion resulting from extensive
3 mortality outside the range of natural variability;
4

5 4) Restore historic vegetation heterogeneity across the
6 project area to improve native plant and wildlife habitat
7 by moving species composition mix to conditions more like
8 pre-settlement composition;
9
10

11 5) Restore and protect habitats for rare and sensitive plant
12 and wildlife species;
13

14 6) Reduce drought stress to trees, and potential for
15 uncharacteristically severe insect infestation due to
16 vegetation densities exceeding the natural range of
17 variation;
18

19 7) Maintain roads and trails to Forest Service standards to
20 prevent erosion and impacts to vegetation;
21

22 8) Reduce road density to improve watershed conditions and
23 achieve travel management objectives; and
24

25 9) Rehabilitate undesired user-created roads and trails with
26 native vegetation.
27
28

1 49. According to the Forest Service, “[p]rescribed fire, including
2 broadcast, pile, and jackpot burning may occur over the entire project
3 area, except pebble plains. In general, prescribed fire occurs between
4 the months of November and June.” (EA, p. 5).

- 5
6 • Broadcast burning, or burning surface fuels, small plants,
7 shrubs and small trees, would occur in plant community
8 types that historically had low-severity and mixed-
9 severity fire regimes such as yellow pine and mixed
10 conifer, meadow, and sagebrush ecosystems. Broadcast
11 burning may occur as a stand-alone treatment where
12 fuels are optimal to support low to moderate intensity
13 fire, or may occur post-mechanical thinning. Broadcast
14 burning is expected to be a continuous and ongoing
15 treatment. The timing of broadcast burning would be
16 dependent on a combination of factors including
17 vegetation response, fuels conditions, weather conditions,
18 availability of resources and is expected to occur with a
19 frequency of 4-10 years per broadcast burn unit.
- 20
21 • Pile burning is burning of slash piles, usually limbs,
22 shrubs and small trees, after mechanical treatments. Pile
23
24
25
26
27
28

1 burning may occur intermittently after mechanical
2 treatment for maintenance of fuel breaks within pinyon-
3 juniper ecosystems.
4

- 5 • Thinning would include hand and mechanical treatments.

6 Hand thinning treatments would occur in areas where
7 slope exceeds 35%, or where there is a significant concern
8 about impacting cultural resources, sensitive plant, soil
9 conditions, or wildlife species and habitat. Variable
10 density thinning, including creation of clumps of trees,
11 widely spaced individual trees, and canopy openings for
12 structural diversity, will occur in yellow pine and mixed
13 conifer stands where stand density is high.
14

- 15 • Thinning to a canopy spacing of approximately 17 trees
16 per acre would occur in pinyon-juniper and mountain
17 mahogany dominated stands within the Wildland Urban
18 Interface (WUI) defense zone to a distance of 300' from
19 structures, private lands, infrastructure and egress
20 routes. Within the WUI defense zone large shrubs may be
21 topped to 2' in height to maintain lower flame lengths. It
22 is expected the overstory thinning will be a one-time
23
24
25
26
27
28

1 treatment. Removal of small trees and shrubs may occur
2 as needed to maintain treatment effectiveness.

- 3
- 4 • Within un-occupied California spotted owl protected
5 activity centers (PACs) hand-thinning of understory white
6 fir may occur to reduce fire behavior. White fir thinning is
7 anticipated to be a one-time treatment limited to
8 unoccupied PACs and will be maintained by prescribed
9 fire. No thinning is planned in occupied PACs.
- 10
- 11
- 12 • Within canyon live oak dominated stands, canyon live oak
13 would be pruned to avoid aggressive resprouting.
- 14
- 15 • Canopy openings of up to 1 acre in pinyon-juniper
16 dominated stands may be created in post-settlement
17 colonized stands, located where advantageous to fire
18 suppression up to 1/3 of pinyon-juniper dominated stands.
- 19
- 20 • Removing conifers established post-settlement from
21 meadows and pebble plains. (EA, pp. 5-7).
- 22
- 23

24 50. The EA admits that “[a]pplication of prescribed fire has the
25 potential to induce fire-based mortality upon residual trees due to
26 scorching of the bole, crown, and/or root system.” (EA, p. 18).
27
28

1 51. A 30-day scoping process was commenced on September 3,
2 2020. The Forest Service circulated a Draft Final Environmental
3 Assessment (“EA”) in September 2021 thereby commencing a 30-day
4 comment period. The Service received nearly 1,500 comments, which for
5 the most part expressed concerns about the Project’s impact on the bald
6 eagles and their habitat.
7

8
9
10 52. A Final EA was circulated for a 45-Day objection period in
11 June 2022. The Service received 89 Objections. Notwithstanding the
12 Objections, the Reviewing Office determined that the District Ranger
13 could proceed with issuing the DN/FONSI.
14

15
16 53. Pursuant to the instructions of the Reviewing Officer, e-bike
17 trails were removed from the final action and analysis of new trail
18 construction was deferred.
19

20 54. The EA and DN/FONSI concluded that an environmental
21 impact statement (“EIS”) was not needed because the Project’s impacts,
22 both short and long term, are not significant.
23

24 55. Plaintiffs reallege and incorporate by reference all preceding
25 paragraphs into each of the claims for relief set forth below.
26

27 **CLAIM FOR RELIEF 1**

28 **(Failure to Ensure Scientific Accuracy and Integrity)**

1 56. Accurate scientific analysis is essential to NEPA
2 implementation. 40 C.F.R. § 1500.1(b). Moreover, an agency needs to set
3 forth its reasoning clearly enough to permit the public to meaningfully
4 and constructively comment. It is fundamental that the public be given
5 an indication of what the agency proposes to do.
6
7

8 57. The EA contains several inaccuracies and misstatements
9 that undermine the Forest Service's conclusion that the Project will not
10 result in any significant impacts on the environment. For example,
11 Land Management Plan ("LMP") Standard S18 requires protection of
12 known raptor nest trees "including not treating the areas within ¼-mile
13 of bald eagle habitat during the period when the most eagles are
14 present (December 1 to April 1)." EA, p. 29. However, as Friends noted
15 in their Objection, contrary to the statement in the EA, bald eagles are
16 present in Grout Bay and utilize the same nest year-round. Friends
17 warned that "If mechanical thinning and prescribed fires are continued
18 in the nest area up to January, the eagle pair will most likely abandon
19 the nest since their nesting activities would be interrupted." (Friends
20 comments on EA).
21
22
23
24
25
26

27 58. Similarly, the Biological Evaluation ("BE")—on which the
28 EA relies—assumes that the eagles' nesting period begins in January,

1 ignoring the detailed documentation Friends provided with its
2 comments demonstrating that each year the eagle pair begins nesting
3 activities in early October. Elsewhere, the BE incorrectly claims that
4 the “timing of nesting in the San Bernardino Mountains is not
5 documented,” ignoring the fact that the timing of the resident bonded
6 eagle pair in Grout Bay has been carefully observed and that the timing
7 of the initiation of their nest has been documented at least since 2015.
8
9
10

11 BE, p. 24

12
13 59. The map of night roost locations for bald eagles is based on
14 outdated data collected in 1990 and updated in 2010. This mapping
15 effort ignores more recent reliable data and will result in insufficient
16 protection for current roosting sites. The EA’s analysis of impact on the
17 bald eagle is tainted by this reliance on outdated data.
18
19

20 60. The EA claims that current forests are unnaturally dense
21 relative to historical forests in the Project area, but the Forest Service’s
22 own current forest survey data in the Project area as well as sources
23 relied upon in the EA document the fact that current forests are
24 substantially less dense than historical forests in the Project area, as
25 detailed in John Muir Project’s Objection. (JMP Objection, p. 4).
26
27
28

CLAIM FOR RELIEF 2

1 **(Failure to Take the Requisite “Hard Look” at Impacts)**

2 61. NEPA requires agencies to take a “hard look” at
3
4 environmental consequences before taking an action. Robertson v.
5 Methow Valley Citizens Council, 490 U.S. 332 (1989).
6

7 62. In order to satisfy NEPA’s “hard look” requirement,
8 agencies need to consider all foreseeable direct and indirect impacts
9 that the action poses, along with cumulative impacts that result from
10 the proposed project together with other projects (past, present, or
11 future). In determining an action’s significance, the agency needs to
12 analyze both the context and intensity of the action—including looking
13 at short- and long-term effects as well as cumulative impacts. 40 C.F.R.
14 § 1508.27.
15
16
17

18 63. The EA fails to take a “hard look” at scientific evidence and
19 arguments, advanced by Plaintiffs, which cast doubt on the veracity of a
20 number of assumptions this Project is based on, particularly the
21 assumption that fuel reduction by tree removal, i.e., thinning, will
22 necessarily reduce the severity of forest fires and represents an effective
23 way to protect adjacent human communities, and the assumption that
24 current forests are denser than historical forests in the Project area. As
25 set forth more fully below, comments of Plaintiff John Muir Project,
26
27
28

1 citing credible and recent studies, including research by Forest Service
2 scientists, cast serious doubt on some of the most fundamental
3 assumptions underlying the entire Project. The Forest Service’s
4 inadequate, dismissive, and cursory response to these comments
5 demonstrates that the Forest Service failed to take the requisite hard
6 look at this contrary evidence.
7
8

9
10 64. The EA’s analysis of direct, indirect, and cumulative impacts
11 on famed resident bald eagles does not pass muster under the “hard
12 look” standard.
13

- 14 • The BE at page 23 states that the duration of the limited
15 operating period (“LOP”) for the bald eagles will be
16 determined based on whether eagles are spotted in the
17 work area doing breeding and nesting behavior but fails
18 to specify any qualifications or other specific guidelines as
19 to how the “spotting” is to be accomplished. This omission
20 is significant because bald eagles are known for being
21 secretive and are therefore not easily spotted. Qualified
22 individuals with specific expertise are needed. The EA did
23 not take a “hard look” at the efficacy and feasibility of this
24 mitigation measure.
25
26
27
28

- 1 • The BE at page 24 includes guidelines that direct the
2 Service to “[a]void treatments in mapped bald eagle nest
3 and night roost habitat **unless treatments are**
4 **designed to improve habitat protection,**” (emphasis
5 added) but fails to define “improve habitat protection” in
6 this context and does not set forth any criteria for
7 evaluation of any proposed action. That guideline also
8 provides that “[w]here that is not feasible to avoid
9 treatments due to community protection measures or not
10 desirable for habitat protection,” other guidelines will be
11 followed. However, other guidelines are inadequate and
12 unreliable in part because they incorrectly claim that the
13 “timing of nesting in the San Bernardino Mountains is not
14 documented.” (BE, p. 25). The nesting has been actively
15 and widely documented since 2015 when the live stream
16 camera was installed on the nest and all activities have
17 been documented thoroughly on the Facebook page
18 <https://www.facebook.com/FOBBV> and the YouTube
19 channel <https://www.youtube.com/c/FOBBVCAM>.

20 Accordingly, the guidelines must be revised in light of the
21
22
23
24
25
26
27
28

1 wealth of information that has been collected about the
2 timing of bald eagle nesting in this area.

- 3
4 • The EA fails to evaluate the impact of removing all live
5 trees less than 16 inches in diameter at breast height
6 (DBH) from the eagle nesting area. There is evidence that
7 removing trees between 8” and 16” can and will
8 substantially affect the canopy cover, which is known to
9 impact bald eagle nesting, yet the EA does not discuss the
10 impact on the canopy cover and in turn, on the eagles.
11 Ironically, the Response to Comments at page 4
12 acknowledges that forest canopy cover must be retained
13 in bald eagle nest stands and night roosts but fails to
14 acknowledge that the removal of trees up to 16 inches in
15 diameter in these areas, which comprise the vast majority
16 of the trees in the Project area (according to Figure 1 of
17 the Silviculture Report), would result in the removal of
18 most of the canopy, creating a fundamental and arbitrary
19 inconsistency and conflict within the EA.
20
21
22
23
24
25
26
27
28

- 1 • The EA fails to evaluate the potential impacts on the bald
2 eagle and other raptors that could result from the removal
3 of trees up to 16” DBH.
- 4 • The BE notes that if removal of daytime perches would
5 leave an area devoid of daytime perch sites, the loss of
6 each perch tree will be mitigated by creating windows in
7 green trees or installing artificial perches on a 2:1 basis.
8 There is no data presented or in the record to show this
9 mitigation would be effective in reducing the impact on
10 Bald Eagles. In fact, this mitigation has been used
11 previously in our valley. The perches were not maintained
12 and fell within a few years of installation and bald eagles
13 no longer utilize that area where the trees were cut down.
- 14 • The BE notes that the many rare species in the area will
15 be severely impacted by the project activities and states
16 harm cannot be avoided. For some species, such as
17 Dammer’s Blue Butterfly, the BE explains that the work
18 in this species’ habitat would be minimal, such as hand
19 thinning, and claims that some of the trail work may be of
20 benefit. This conclusion, however, is not supported by any
21
22
23
24
25
26
27
28

1 concrete evidence or analysis of the potential risk of harm
2 relative to any realistic long-term benefit to any of these
3 species. For other species with broader habitat range, the
4 BE states that the Project will “attempt to retain” habitat
5 (BE, p. 18) and again claims that some of the trail work
6 “may” be of benefit, but again fails to include any analysis
7 of the purported benefits of thinning in those areas or of
8 adding trails compared to the risk of direct harm to
9 sensitive species and their habitat.
10
11
12
13

14 **CLAIM FOR RELIEF 3**

15 **(Improper Analysis of Conflicting Science)**

16
17 65. Accurate scientific analysis is essential to the NEPA process.
18 40 C.F.R. § 1500.1. NEPA requires agencies to disclose, analyze, and
19 make good faith response to contrary scientific opinions and studies.
20

21 66. In their comments and objections to the proposed Project,
22 Plaintiffs argued that mechanical thinning, which includes widespread
23 removal of thousands of mature trees, could potentially increase, not
24 decrease, fire severity.
25
26

27 67. This argument was based on citations to numerous scientific
28 studies that were submitted with the comments, including Forest

1 Service research. In their objections and comments, Plaintiff John Muir
2 Project argued that the studies that the Forest Service relied on were
3 outdated and biased to the extent that they were prepared on behalf of
4 logging interests. During the objection period, Plaintiffs notified the
5 Forest Service of additional scientific sources finding that thinning
6 increases fire risk and effects, as well as a newly-published study,
7 Baker et al. (2023) (<https://www.mdpi.com/2571-6255/6/4/146>), which
8 critiqued Hagmann et al. (2021)
9 (<https://esajournals.onlinelibrary.wiley.com/doi/abs/10.1002/eap.2431>), a
10 Forest Service study the EA largely and fundamentally relies upon and
11 cites with approval with regard to forest density, fire behavior, and
12 thinning. Baker et al. (2023) meticulously documented the fact that
13 Hagmann et al. (2021) represented a “falsification of the scientific
14 record.”

15
16
17
18
19
20
21 68. The reliability and validity of the scientific papers on which
22 Plaintiffs’ arguments are based was recognized by the Ninth Circuit
23 Court of Appeals in the BARK v. United States Forest Service, 958 F.3d
24 865, 869-871 (9th Cir. 2020).

25
26
27 69. Referring to some of the scientific studies cited in Plaintiffs’
28 comments and objections here, the Ninth Circuit found that the

1 plaintiffs in BARK had identified “considerable scientific evidence
2 showing that variable density thinning will not achieve” the purpose of
3 “reduc[ing] the risk of wildfires and promot[ing] safe fire-suppression
4 activities.” BARK v. United States Forest Service, 958 F.3d 865, 870
5 (9th Cir. 2020). Considering both context and intensity, as required by
6 40 C.F.R. § 1508.27, this evidence raises substantial questions about
7 the Project's environmental impact, and an EIS is required.” BARK v.
8 United States Forest Service, 958 F.3d 865, 870 (9th Cir. 2020).
9
10
11

12 70. The Court further found that “[s]ubstantial expert opinion
13 presented by the Appellants during the administrative process disputes
14 the USFS's conclusion that thinning is helpful for fire suppression and
15 safety. For example, Oregon Wild pointed out in its EA comments that
16 ‘[f]uel treatments have a modest effect on fire behavior, and could even
17 make fire worse instead of better.’ It averred that removing mature
18 trees is especially likely to have a net negative effect on fire
19 suppression. Importantly, the organization pointed to expert studies
20 and research reviews that support this assertion.” BARK v. United
21 States Forest Service, 958 F.3d 865, 870 (9th Cir. 2020)
22
23
24
25
26

27 71. The Court also cited with approval plaintiff BARK’s
28 assertion that “reducing fuels does not consistently prevent large forest

1 fires, and seldom significantly reduces the outcome of these large fires,’
2 citing an article from Forest Ecology and Management. BARK also
3
4 directed the USFS to a recent study published in The Open Forest
5 Science Journal, which concluded that fuel treatments are unlikely to
6
7 reduce fire severity and consequent impacts, because often the treated
8 area is not affected by fire before the fuels return to normal levels.”

9
10 BARK v. United States Forest Service, 958 F.3d 865, 870 (9th Cir.
11 2020).

12
13 72. BARK further noted that, while "BARK discussed [during
14 the scoping process] the studies that have found that fuel reduction may
15 actually exacerbate fire severity in some cases as such projects leave
16 behind combustible slash, open the forest canopy to create more ground-
17 level biomass, and increase solar radiation which dries out the
18 understory[,] [t]he EA did not discuss this information.” BARK v.
19
20 United States Forest Service, 958 F.3d 865, 871 (9th Cir. 2020).

21
22
23 73. NEPA requires agencies to disclose, analyze, and make good
24 faith responses to considered contrary scientific opinions, but the Forest
25 Service failed to make a good faith response to the contrary scientific
26 opinions cited by Plaintiffs. The Forest Service’s failure to analyze the
27
28

1 newer conflicting science cited by Plaintiffs was arbitrary, capricious, or
2 not in accordance with NEPA, in violation of 5 U.S.C. § 706(2)(A).
3

4 **CLAIM FOR RELIEF 4**

5 **(Improper Denial of Scientific Controversy)**

6
7 74. One of the factors the Forest Service was required to
8 consider is “the degree to which the effects on the quality of the human
9 environment are likely to be highly controversial.” 40 C.F.R. § 1508.27.
10

11 75. Instead of acknowledging and meaningfully addressing the
12 scientific controversy surrounding the effects of widespread tree
13 removal on wildfires and providing a good faith analysis of the opposing
14 views, the Forest Service denied the existence of any controversy
15 whatsoever. In this regard, the DN/FONSI, on p. 11, claimed “[t]here is
16 no known credible scientific controversy over the impacts of the
17 proposed action, and the scoping has not raised substantive scientific
18 controversy related to the effects of the proposed project on the human
19 environment.”
20
21
22
23

24 76. Regarding the studies cited by Plaintiffs in their comments
25 and objections, the DN/FONSI merely states that “some stakeholders
26 asserted there is significant scientific dispute regarding the efficacy
27 of forest thinning and prescribed burning in reducing fire hazard.
28

1 However, the overwhelming body of science supports the analysis and
2 conclusions in the EA And the contrary opinion does not rise to the
3 level of a credible scientific dispute indicating substantial controversy
4 or uncertainty.” DN/FONSI, p. 11. These arguments and contentions
5 are disingenuous at best, and directly contradict BARK v. United States
6 Forest Service, 958 F.3d 865 (9th Cir. 2020), which reached the opposite
7 conclusion. Similarly, the DN/FONSI, on p. 10, dismissed the threat
8 this Project poses to public safety from increased wildfire severity due
9 to thinning, and the risk of prescribed fire escapes, claiming the
10 following: “There will be no significant effects on public health and
11 safety.”
12
13
14
15
16

17 CLAIM FOR RELIEF 5

18 (Improper Assessment of a Finding of No Significant Impact)

19
20 77. A FONSI can be prepared if the Defendants determine on
21 the basis of the EA that an EIS is not required because there will be no
22 significant effects to the human environment from the proposed action.
23 40 C.F.R. § 1501.4(e).
24

25
26 78. The DN/FONSI prepared in this case was improper because
27 the EA on which it was based was plainly inadequate and did not
28 provide sufficient support for a finding of no significant impact as a

1 result of the Defendants’ action. Defendants’ DN/FONSI and the
2 conclusions on which it was based were arbitrary, capricious, or not in
3 accordance with NEPA, in violation of 5 U.S.C. § 706(2)(A).
4

5 **CLAIM FOR RELIEF 6**

6 **(Failure to Prepare an EIS)**

7
8 79. NEPA requires that Defendants prepare an EIS “in every
9 recommendation or report on proposals for legislation and other major
10 federal actions significantly affecting the quality of the human
11 environment.” 42 U.S.C. § 4332(C); *see also*, 40 C.F.R. § 1502.3. These
12 agencies must complete an EIS if (1) the proposed project “is a major
13 federal action” and (2) the proposed project may “significantly affect the
14 quality of the human environment.” 42 U.S.C. § 4332; *see also*, 40
15 C.F.R. § 1508.18.
16
17
18
19

20 80. Although NEPA regulations allow an agency to avoid
21 initially preparing a complete EIS by first preparing an EA and then
22 issuing a FONSI, if appropriate (40 C.F.R. § 1508.9), the inadequate EA
23 and underlying record here do not support the Defendants’ DN/FONSI
24 and failure to prepare an EIS.
25
26

27 81. Given the impacts that the Project may have on the human
28 environment, including the safety of adjacent communities, impacts to

1 protected species, as well as the inadequacy and inaccuracy of the EA,
2 Defendants' failure to prepare an EIS was arbitrary, capricious, or not
3
4 in accordance with NEPA, in violation of 5 U.S.C. § 706(2)(A).

5
6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs respectfully pray for an order and
8 judgment:

- 9
10 a. Declaring that the Forest Service's DN/FONSI for the
11 Project violates NEPA, and is arbitrary, capricious, or not
12 in accordance with law under the APA, 5 U.S.C. §
13 706(2)(A);
14
15 b. Vacating and setting aside the USFS's DN/FONSI for the
16 Project as an illegal agency action under the APA;
17
18 c. Permanently enjoining the Forest Service from
19 implementing the Project unless and until the agency
20 complies with NEPA;
21
22 d. Entering appropriate injunctive relief to ensure that
23 Defendants comply with NEPA, and specifically to ensure
24 that Defendants and their agents take no further actions
25 toward proceeding with the challenged Project unless and
26 until they have complied with NEPA;
27
28

- 1 e. Awarding Plaintiff its reasonable attorneys' fees and costs
2 pursuant to the Equal Access to Justice Act, 28 U.S.C. §
3 2412; and
4
5 f. Awarding such further relief as the Court deems just and
6 equitable.
7

8 Respectfully submitted this 10th day of August, 2023.

9
10 *Babak Naficy*

11

Babak Naficy
12 *Attorney for Plaintiffs*