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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
13 **SACRAMENTO DIVISION**

14	CONSERVATION CONGRESS,)	Case No. 2:13-cv-01977-JAM-DAD
15)	
16	Plaintiff,)	
17)	
18	v.)	SECOND AMENDED COMPLAINT
19)	
20	UNITED STATES FOREST SERVICE and)	
21	UNITED STATES FISH AND WILDLIFE)	
22	SERVICE,)	
23)	
24	Defendants,)	
25)	
26	and)	
27)	
28	TRINITY LUMBER COMPANY,)	
)	
	Intervenor-Defendant.)	

1. The Northern spotted owl was listed as a threatened species in need of the important protections of the Endangered Species Act (“ESA”) in 1990. Despite the fact that the Northern spotted owl was listed for ESA protections twenty-five years ago, the most recent demographic data acquired by biologists with the United States Forest Service (“USFS”) and the United States

1 Fish and Wildlife Service (“FWS”) shows that the range-wide population of the species
2 continues to decline by approximately 3% each year. In June 2015, the USFWS proposed the
3 owl for uplisting to endangered status under the ESA because of the continuing population
4 decline.

5 2. The downward population trend observed for the species as a whole is far more
6 accelerated in northwestern California. A March 2014 report of survey results prepared under
7 USFS contract – “Monitoring the Population Ecology of Spotted Owls in Northwestern
8 California: Annual Results, 2013” – concludes that Northern spotted owls are no longer detected
9 in more than 30% of historically occupied owl territories in the northwestern California survey
10 area.

11 3. Owl biologists theorize that Northern spotted owl populations in the Mendocino
12 National Forest are particularly vulnerable to population declines associated with climate change,
13 as these populations exist at the southern-most inland portion – the hottest and the driest portion
14 – of the species’ range.

15 4. Owl biologists have also noted that Northern spotted owl populations in the
16 Mendocino National Forest are now being affected by the recent arrival of barred owls which
17 generally out-compete Northern spotted owls for habitat and displace Northern spotted owls from
18 their customary nest sites.

19 5. In light of the on-going threats facing Northern spotted owls in the Mendocino
20 National Forest, owls specialists at the FWS have stated that habitat degradation associated with
21 national forest management “could have an exponentially negative effect on Northern spotted
22 owls’ survival rate.” Likewise, in its 2000 Late Successional Reserve Assessment (“LSR
23 Assessment”) for the Mendocino National Forest, the USFS determined that habitat removal in
24 the Buttermilk LSR – where the Smokey Project timber sale is located – is associated with the
25 abandonment of previously occupied owl sites.

26 6. Despite the precariousness of the Northern spotted owls’ continued survival in the
27 Mendocino National Forest, and despite the fact that both the USFS and the FWS have
28 highlighted the risks of habitat removal in the Mendocino National Forest, the USFS approved a

1 large timber sale in the heart of the species' habitat on the forest. Approval of the so-called
2 "Smokey Project" – which was authorized by an August 30, 2012 "Decision Notice and Finding
3 of No Significant Impact" – clears the way for the cutting of a significant amount of nesting,
4 roosting, and foraging habitat for the Northern spotted owl.

5 7. The Smokey Project timber sale will take place in an area of the Mendocino National
6 Forest known as the Buttermilk Late Successional Reserve ("LSR"), an important old-growth
7 forest habitat remnant previously determined by the USFS to be essential to the survival and
8 recovery of the Northern spotted owl.

9 8. The high value of the old growth forest habitat in the Smokey Project timber sale area
10 is reflected by the high amount of Northern spotted owl habitat in the area. During the planning
11 process for the timber sale, a USFS biologist concluded that the entire timber sale area is either in
12 Northern spotted owl nesting habitat, or within ¼ mile of such habitat. Furthermore, the USFS's
13 2000 LSR Assessment concluded that Northern spotted owls utilize all available habitat in the
14 Buttermilk LSR, where the Smokey Project timber sale is located.

15 9. The USFS's primary justification for approval and implementation of the Smokey
16 Project timber sale is protection of late successional habitat in the Buttermilk LSR from wildfire
17 and insect damage, but this purpose is inconsistent with the USFS's prior determination that
18 forest management is not necessary to manage wildfire risk in the Buttermilk LSR. In the 2000
19 LSR Assessment, the USFS concluded that "there is no appreciable difference in the maximum
20 or minimum potential outcomes [for Northern spotted owl habitat] between the treatment and no
21 treatment scenarios." Indeed, the USFS went on to state that "*it appears that there may be more
22 late successional habitat as a result of not treating fuels within [the Buttermilk LSR].*"

23 (Emphasis added.)

24 10. Accordingly, it is clear that late successional habitat is *not* promoted by approval and
25 implementation of the Smokey Project timber sale. To the contrary, the most recent and credible
26 science available to the USFS and the FWS shows that USFS forest management actions like the
27 Smokey Project timber sale (1) are not necessary for Northern spotted owl habitat conservation,
28 (2) tend to adversely affect Northern spotted owl habitat, and (3) have resulted in the

1 abandonment of historic nest sites.

2 11. As approved on August 30, 2012, the Smokey Project timber sale would have a
3 serious impact on an important core population of Northern spotted owls in a vulnerable
4 geographic area in violation of the National Forest Management Act (“NFMA”), the National
5 Environmental Protection Act (“NEPA”), the ESA, and the Administrative Procedures Act
6 (“APA”).

7 12. Accordingly, on September 23, 2013 Plaintiff Conservation Congress commenced
8 this action against Defendant USFS and Defendant FWS. In its original complaint, Plaintiff
9 alleged (1) that the USFS’s decision to authorize the Smokey Project violated NFMA, NEPA, the
10 ESA, and the APA and (2) that the FWS’s Biological Opinion addressing the impacts of the
11 project on the threatened Northern spotted owl violated the ESA and the APA.

12 13. The commencement of this litigation forced the USFS to suspend implementation of
13 the Smokey Project on November 12, 2013 – prior to initiation of operations – and the Smokey
14 Project remains suspended until this day. During this period of time, the USFS and the FWS
15 have twice endeavored to cure various inadequacies with their ESA compliance in connection
16 with the Smokey Project. This effort has included two successive “reconsultations” between the
17 USFS and the FWS. The recently issued Second Supplemental Biological Opinion constitutes
18 the parties’ latest effort to comply with the ESA.

19 14. In this second amended complaint, Plaintiff continues to allege (1) that the USFS’s
20 decision to authorize the Smokey Project violates NFMA, NEPA, the ESA, and the APA and (2)
21 that the FWS’s Biological Opinion addressing the impacts of the project on the threatened
22 Northern spotted owl violates the ESA and the APA.

23 15. As relief, Plaintiff seeks a declaration that the USFS’s approval of the Smokey
24 Project violates NFMA, NEPA, the ESA and the APA, and a declaration that the FWS’s Second
25 Supplemental Biological Opinion for the Smokey Project violates the ESA and the APA.
26 Plaintiff further seeks an injunction prohibiting the USFS from proceeding with the Smokey
27 Project timber sale until the USFS and the FWS have complied with their statutory obligations in
28 connection with the Smokey Project.

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JURISDICTION

16. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because this lawsuit presents a federal question under the laws of the United States, including the ESA, 16 U.S.C. §§ 1531 *et seq.*, NEPA, 42 U.S.C. §§ 4321 *et seq.*, NFMA, 16 U.S.C. §§ 1600 *et seq.*, the APA, 5 U.S.C. §§ 701 *et seq.*, the Declaratory Judgment Act (“DJA”), 28 U.S.C. §§ 2201 *et seq.*, and the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412. This Court also has jurisdiction under 28 U.S.C. § 1346 (United States as defendant); 28 U.S.C. § 1361 (action to compel an officer of the United States to perform her duty); and 16 U.S.C. § 1540(g) (ESA citizen suit provision).

17. Plaintiff’s request for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201(a) and 2202 (DJA), 16 U.S.C. § 1540(g)(1)(A) (ESA), and 5 U.S.C. § 706(2)(A) (APA).

18. More than 60 days prior to commencing this action which includes ESA citizen’s suit claims against the USFS, Plaintiff provided the USFS and the Secretary of the Interior with written notice of the ESA citizen’s suit claims asserted in this action as required by 16 U.S.C. § 1540(g)(2)(A)(i).

19. The USFS has not taken action to remedy the violations of the ESA explained in Plaintiff’s notice letter. Accordingly, an actual controversy, within the meaning of the DJA, exists between the Plaintiff and the USFS in connection with the citizen’s suit claims raised in this Second Amended Complaint.

20. Plaintiff has exhausted all administrative remedies available to it as required by the APA.

VENUE

21. Venue properly rests in the Eastern District of California pursuant to 16 U.S.C. § 1540(g)(3)(A) because the alleged violations of the ESA occur in this judicial district. Additionally, venue for Plaintiff’s NEPA, NFMA, and APA claims properly rests in the Eastern District of California pursuant to 28 U.S.C. § 1391(e)(2) because a substantial part of the events or omissions giving rise to Plaintiff’s claims occur in this district and the federal public land involved in the Smokey Project is located in this district.

INTRADISTRICT VENUE

1 22. This case should be assigned to the Sacramento Division of this Court because the
2 Smokey Project is located in Glenn and Tehama Counties and the directly responsible office of
3 the USFS is located in Glenn County. See L.R. 120(d).

4 **PARTIES**

5 23. Plaintiff, CONSERVATION CONGRESS, is a non-profit, Internal Revenue Code
6 Section 501(c)(3) organization, incorporated in California. Its membership includes individuals,
7 organizations, and businesses. Conservation Congress is dedicated to maintaining, protecting
8 and restoring the native ecosystems of northern California. It has a longstanding organizational
9 interest in the proper and lawful management of the National Forests, including the Mendocino
10 National Forest, located in northern California. Additionally, Conservation Congress has an
11 organizational interest in the protection of the Northern spotted owl. Conservation Congress
12 participated in the NEPA scoping process, public comment process, and Healthy Forests
13 Restoration Act (“HFRA”) objection process conducted by the USFS for the Smokey Project.
14 Conservation Congress’ members, officers, and staff participate in a wide range of aesthetic,
15 scientific, business, and recreational activities, such as hiking, fishing, hunting, photography,
16 wildlife viewing, appreciation of scenery, and bird watching, including attempts to view and
17 appreciate the Northern spotted owl, on the Mendocino National Forest, including the area of the
18 Smokey Project, and have concrete plans to continue these activities. The organization’s
19 membership includes professional photography businesses and freelance photographers who earn
20 income by photographing in northern California’s National Forests, including the Mendocino
21 National Forest. Conservation Congress’ members, officers, and staff pursue, and have concrete
22 plans to continue pursuing, aesthetic, scientific, business and recreational activities in the
23 Mendocino National Forest’s Grindstone Ranger District, including on the lands involved in the
24 Smokey Project and surrounding areas. These interests of Conservation Congress, its members,
25 officers, and staff are substantial and are adversely affected by Defendants’ failure to comply
26 with the ESA, NEPA, NFMA, and APA. The requested relief will redress the injuries of
27 Conservation Congress and its members, officers, and staff.

28 24. Defendant, UNITED STATES FOREST SERVICE (“USFS”) is a federal agency

1 within the U.S. Department of Agriculture. The USFS is responsible for the management of the
2 National Forests, including the Mendocino National Forest. As part of its management
3 responsibility, the USFS must insure that activities it conducts or authorizes on the Mendocino
4 National Forest comply with the ESA, NEPA and NFMA. The USFS authorized the Smokey
5 Project.

6 25. Defendant, UNITED STATES FISH AND WILDLIFE SERVICE (“FWS”) is a
7 federal agency within the U.S. Department of the Interior. The Secretary of the Interior has
8 delegated to the FWS responsibility for administration and implementation of the ESA. Under
9 Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), the FWS must engage in a process known as
10 “consultation” with other federal agencies, such as the USFS, to insure that any action
11 authorized, funded or carried out by such agency is not likely to jeopardize the continued
12 existence of any endangered or threatened species or result in the destruction or adverse
13 modification of any designated critical habitat of such species.

14 26. Intervenor- Defendant TRINITY LUMBER COMPANY claims to have an interest in
15 the outcome of this litigation by virtue of its contractual rights in the Smokey Project.

16 GOVERNING LAW

17 A. The Endangered Species Act

18 27. The structure and function of the ESA, 16 U.S.C. §1531 *et seq.*, are premised on
19 Congress’s finding that the biggest threat to the continued survival of threatened and endangered
20 wildlife species is the destruction of their natural habitats. Accordingly, the ESA contains
21 various provisions that are specifically intended to halt the trend of habitat destruction.
22

23 28. The expressed purpose of the ESA is “to provide a program for the conservation [of]
24 endangered species and threatened species” and “to provide a means whereby the ecosystems
25 upon which [such] species depend may be conserved.” 16 U.S.C. §1531(b).

26 29. Pursuant to the ESA, the FWS has the duty to list imperiled species as threatened or
27 endangered on the basis of biological criteria. 16 U.S.C. §1533(c).
28

1 30. Once a species is listed for protection under the ESA, the FWS has an obligation to
2 prepare a “Recovery Plan” for the species pursuant to ESA Section 4(f). 16 U.S.C. §1533(f).
3 The purpose of a Recovery Plan is to define those management constraints and actions that will
4 promote the conservation and survival of listed species, and to develop criteria for the “delisting”
5 of listed species.
6

7 31. After a species is listed as threatened or endangered under the ESA, Section 7(a)(1)
8 of the ESA imposes important obligations on federal agencies to “conserve” such species. 16
9 U.S.C. §1536(a)(1). For purposes of ESA compliance, the duty to “conserve” requires that
10 federal agencies use their authorities to assure the survival of threatened and endangered species,
11 to protect their critical habitats, and to promote the recovery of the species to the point at which
12 they no longer require the protections of the ESA.
13

14 32. Pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), federal agencies have
15 a mandatory substantive duty to “insure that any action . . . is not likely to jeopardize the
16 continued existence of any endangered species or threatened species or result in the destruction
17 or adverse modification” of the species’ designated critical habitat.³
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19 33. In order to assure that federal agencies comply with their substantive Section 7(a)(1)
20 duty to conserve and their substantive Section 7(a)(2) duty to insure against jeopardy or adverse
21 modification of designated critical habitat, Section 7(a)(2) of the ESA mandates a “formal
22 consultation” process which requires all federal agencies to consult with the FWS as to those
23 projects that may adversely affect a listed species or may adversely modify designated critical
24

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26 ³

27 Hereafter in this Second Amended Complaint, the statutory phrase “destruction or
28 adverse modification” will be shorted to “adverse modification” or, when contextually
appropriate, “adversely modify.”

1 habitat. 16 U.S.C. §1536(a)(2).⁴ The duties set out in Section 7(a)(2) are known as the “Section
2 7 procedural duties.”

3 34. The first step in the formal consultation process is a written request for the initiation
4 of formal consultation from the action agency to the FWS. 16 U.S.C. §1536(c), 50 C.F.R.
5 §402.14(c). This submission includes a Biological Assessment prepared by the action agency in
6 which the action agency identifies the action which it proposes to implement and assesses the
7 expected impact of the proposed action on listed species and their designated critical habitats. 16
8 U.S.C. §1536(c), 50 C.F.R. §§402.12, 402.14.

9 35. The formal consultation process, including the FWS’s analysis of jeopardy to species
10 and adverse effects to critical habitat, concludes with the issuance of a Biological Opinion by the
11 FWS.

12 36. In undertaking its ESA Section 7(a)(2) jeopardy and critical analyses, the FWS must
13 consider how a proposed action affects a species’ prospects for *recovery*, as well as its prospects
14 for *survival*. A species’ prospects for recovery are adversely effected when an action’s impacts
15 reduce the reproduction, numbers, and/or distribution of the species. 50 C.F.R. §402.02, NWF
16 v. NMFS, 524 F.3d 917, 932 (9th Cir. 2008).

17 37. Throughout the ESA Section 7 formal consultation process – including the
18 development of both the BA and the Biological Opinion – the action agency and the FWS must
19 utilize the “best scientific and commercial data available.” 16 U.S.C. §1536(a)(2), 50 C.F.R.
20 §§402.14(f), 402.14(g)(8).

21 4

22 In the case of threatened and endangered maritime species, federal agencies
23 conduct their Section 7 consultations with the National Marine Fisheries Service
24 (“NMFS”) instead of the FWS.

1 38. In the Biological Opinions that it issues at the conclusion of the formal consultation
2 process, the FWS determines whether a proposed agency action comports with its Section 7
3 substantive duties. If the FWS finds that a proposed agency action will jeopardize a listed
4 species or adversely modify its designated critical habitat, the FWS formulates a “Reasonable
5 and Prudent Alternative” (“RPA”) which avoids that effect.
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7 39. During the course of the Section 7(a)(2) formal consultation process, an agency
8 action is prohibited by ESA Section 7(d) from taking any action that would result in irreversible
9 and irretrievable effects. 16 U.S.C. §1536(d).
10

11 40. The Ninth Circuit Court of Appeals has determined that timber cutting activities on
12 public lands “constitute *per se* irreversible and irretrievable commitments of resources under
13 §7(d) and thus [cannot] go forward during the consultation period.” Pacific Rivers Council v.
14 Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994), Lane County Audubon Society v. Jamison, 958 F.2d
15 290, 295 (9th Cir. 1992).
16

17 41. Section 9 of the ESA and its implementing regulations prohibit any person, including
18 any federal agency, from "taking" a threatened species. See 16 U.S.C. §1538(a)(1); 50 C.F.R.
19 §227.21. Taking is defined broadly under the ESA to include harming, harassing, or killing a
20 protected species either directly or by degrading its habitat sufficiently to significantly impair
21 essential behavioral patterns. See U.S.C. §1532(19); 50 C.F.R. §17.3.
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23 42. A federal agency may “take” a listed species incidental to an otherwise lawful
24 activity only after obtaining an Incidental Take Statement (“ITS”) from the FWS. 16 U.S.C.
25 §§1536(b)(4), 1536(o). The FWS incorporates an ITS into the Biological Opinions that it issues,
26 if it finds that implementation of the action that is the subject of a Biological Opinion will result
27 in the “incidental take” of individuals of a listed species but that the level of anticipated
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1 incidental take will not jeopardize a species' continued survival or recovery or adversely modify
2 its designated critical habitat. 16 U.S.C. §1536(b)(4).

3 43. An ITS sets forth the amount of incidental take that is permitted, and that is therefore
4 exempt from the take prohibition of ESA Section 9. Id. In every ITS, the FWS has an
5 affirmative obligation to specify the amount of incidental take that is expected to occur as a result
6 of the implementation of the federal action which is the subject of the Biological Opinion. 16
7 U.S.C. §1536(b)(4)(C)(i), 50 C.F.R. §402.14(i)(1)(i).

8 44. If an agency exceeds the amount of incidental take allowed by an ITS, or does not
9 comply with the "terms and conditions" set forth in the ITS, or modifies the action which is the
10 subject of a Biological Opinion/ITS in such a way that implementation of the action may affect a
11 listed species or its designated critical habitat in a manner not addressed in the original Biological
12 Opinion, then the agency has a mandatory obligation to re-initiate formal consultation with the
13 FWS. 50 C.F.R. §402.16.

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16 **B. The National Environmental Policy Act**

17 45. NEPA is our "basic national charter for protection of the environment." 40 C.F.R. §
18 1500.1(a).

19 46. NEPA and its implementing regulations promulgated by the Council on
20 Environmental Quality require federal agencies to prepare an environmental impact statement
21 ("EIS") for "every recommendation or report on proposals for legislation and other major Federal
22 actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C);
23 40 C.F.R. § 1508.11.

24 47. If an agency is uncertain as to whether or not a proposed action is associated with the
25 possibility of significant environmental effects, thereby triggering the need for preparation of an
26 EIS, it may first prepare a shorter and more concise document called an Environmental
27 Assessment ("EA"). 40 C.F.R. § 1501.4(b). In an EA, the proponent agency evaluates both the
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1 “context” and the “intensity” of the proposed action in order to assess the potential for significant
2 environmental impacts. 40 C.F.R. § 1508.27.

3 48. If the analysis conducted in connection with preparation of an EA shows that
4 implementation of the proposed agency action is associated with any *possibility* of significant
5 adverse effects, the agency must prepare an EIS. Blue Mountains Biodiversity Project v.
6 Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998).

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

12 50. The primary purpose of an EIS “is to serve as an action-forcing device to insure that
13 the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of
14 the Federal Government.” 40 C.F.R. § 1502.1.

15 51. “NEPA procedures must insure that environmental information is available to public
16 officials and citizens before decisions are made and before actions are taken ... Accurate
17 scientific analysis, expert agency comments, and public scrutiny are essential to implementing
18 NEPA.” 40 C.F.R. § 1500.1(b).

19 52. NEPA requires federal agencies to analyze the direct, indirect, and cumulative
20 impacts of proposed actions. 40 C.F.R. §§ 1508.7 & 1508.8. NEPA also requires federal
21 agencies to take a “hard look” at the environmental effects of their proposed action, even after
22 the proposal has received initial approval. Marsh v. Oregon Nat. Res. Council, 490 U.S. 360,
23 374 (1989).

24 53. Additionally, NEPA requires that federal agencies prepare a supplemental analysis if
25 the agency “makes substantial changes in the proposed action that are relevant to environmental
26 concerns.” 40 C.F.R. § 1502.9(c).

27 **C. The National Forest Management Act**

28 54. NFMA requires the USFS to create a comprehensive Land and Resource

1 Management Plan for each national forest. 16 U.S.C. §§ 1604(a), (e); Inland Empire Pub. Lands
2 Council v. U.S. Forest Serv., 88 F.3d 754, 757 (9th Cir. 1996)(describing how the USFS first
3 develops a Land and Resource Management Plan consistent with the requirements of NFMA);
4 Lands Council v. Powell, 395 F.3d 1019, 1032-33 (9th Cir. 2005).

5 55. Once a Land and Resource Management Plan is adopted for a specific national forest,
6 NFMA prohibits any site-specific activities that are inconsistent with that Plan. Inland Empire
7 Pub. Lands Council, 88 F.3d at 757 (“[S]ite-specific projects must be consistent with the stage-
8 one, forest-wide plan.”); Lands Council, 395 F.3d at 1033.

9 56. Pursuant to 16 U.S.C. § 1604(g)(3)(B), the USFS is required to “provide for diversity
10 of plant and animal communities.”

11 57. As part of its duty under NFMA to provide for a diversity of animal communities, the
12 USFS must ensure that every Land and Resource Management Plan incorporates provisions that
13 provide for the protection of ecological conditions necessary to contribute to the recovery of
14 ESA-listed species. 36 C.F.R. § 219.9(b)(1).

15 **D. The Administrative Procedure Act**

16 58. The APA governs the scope of review of Plaintiff’s NEPA, NFMA, and ESA claims
17 against the USFS, and Plaintiff’s ESA claims against the FWS. The scope of review of
18 Plaintiff’s ESA claims against USFS is governed by the citizen suit provision of the ESA.
19 However, because the ESA contains no internal standard of review, section 706 of the APA, 5
20 U.S.C. § 706, governs the standard of review for agency actions. Village of False Pass v. Clark,
21 733 F.2d 605, 609 (9th Cir. 1984).

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

25 60. The APA provides “the reviewing court shall ... hold unlawful and set aside agency
26 actions, findings, and conclusions found to be ... arbitrary, capricious, or an abuse of discretion
27 or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), or which have been taken
28 “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

FACTUAL ALLEGATIONS

A. The Northern Spotted Owl

61. Historically, the Northern spotted owl, *Strix occidentalis caurina*, ranged in structurally complex forests, commonly referred to as “old growth” forests, from southwest British Columbia through the Cascade Mountains and coastal ranges in Washington, Oregon and California, as far south as Marin County, California. Today, however, with the destruction of most old growth forests, the Northern spotted owl’s range and populations are dramatically reduced.

62. Due to the widespread loss of Northern spotted owl habitat, the inadequacy of existing regulatory mechanisms to conserve the species, and its precipitous decline, the FWS listed the Northern spotted owl as a threatened species under the ESA in 1990. 55 Fed. Reg. 26114 (June 26, 1990).

63. The FWS has developed a survey protocol for land management agencies – such as the USFS – to use when they are considering implementation of a project in Northern spotted owl habitat. The FWS has stated that that protocol – known as the “2012 Survey Protocol” – is based on the best available scientific information concerning the Northern spotted owl. One of the core innovations of the 2012 Survey Protocol is that it accounts for the fact that Northern spotted owls tend not to respond to survey calls in those circumstances where barred owls are present.

64. Current management of known Northern spotted owls focuses on “Activity Centers,” which in the Mendocino National Forest are circles with a 1.3 mile radius centered on a known owl pair’s nest site. A smaller circle inside the Activity Center with a 0.5 mile radius centered on the nest site is known as the “core area.”

65. Recent studies of Northern spotted owl populations indicated the species’ population over the extent of its range is declining at approximately three percent per year. However, as noted at the outset of this Second Amended Complaint, Northern spotted owl populations in northwestern California are declining far more rapidly than that.

B. Late Successional Reserves

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

7 67. The protected blocks of habitat established in the NWFP are referred to as Late
8 Successional Reserves – or LSRs – and are areas in which logging and other ground-disturbing
9 activities are generally prohibited to protect the ecosystem and conserve the Northern spotted owl
10 and other species.

11 68. In 2000, the Mendocino National Forest prepared a Forest-wide LSR Assessment as
12 required by the NWFP. The purpose of the Mendocino National Forest LSR Assessment was to
13 identify LSRs on the national forest, and to set forth criteria for future USFS management actions
14 within those identified LSRs. According to the 2000 LSR Assessment, “[t]he management
15 objective for LSRs is to protect and enhance conditions of late successional forest ecosystems,
16 which serve as habitat for dependent species, including the Northern spotted owl.”

17 69. The management criteria set out in the LSR Assessment are a binding component
18 part of the Mendocino National Forest Land and Resource Management Plan, and “[a]ll proposed
19 actions [on the Mendocino National Forest] should follow” the management criteria set out in the
20 LSR Assessment.

21 70. The management criteria set out in the LSR Assessment – and which are therefore
22 binding on the USFS in this case pursuant to the “consistency” requirement of NFMA, 16 U.S.C.
23 § 1604(i) – impose very strict requirements on the USFS in connection with the cutting of large
24 old trees in LSRs. In pertinent part, the management criteria state that “[t]hinning will be from
25 below *so that no dominant crown class trees are removed.*” (Emphasis added.)

26 71. As noted above, in connection with the Buttermilk LSR on the Mendocino National
27 Forest – where the Smokey Project is located – the LSR Assessment concludes that fuel
28 treatments in the LSR will not contribute to the protection and/or creation of late successional

1 habitat. To the contrary, the LSR Assessment concludes that “there may be more late
2 successional habitat [in the Buttermilk LSR] as a result of not treating fuels.”

3 72. The LSR Assessment also reports that prior timber sales in the Buttermilk LSR
4 resulted in territory abandonment by at least two Northern spotted owl pairs, and that northern
5 spotted owls are currently utilizing all available suitable habitat in the LSR.

6 73. The USFS also concludes in the LSR Assessment that the Buttermilk LSR is one of
7 the two “most important LSRs found on the [Mendocino National] Forest in terms of
8 maintaining healthy, mobile populations of late successional habitat dependent species in the
9 Mendocino National Forest.”

10 **C. Critical Habitat Designation for the Northern Spotted Owl**

11 74. The FWS initially designated critical habitat for the Northern spotted owl in 1992.
12 57 Fed. Reg. 1796 (Jan. 15, 1992).

13 75. In 2008, the FWS revised its critical habitat designation for the Northern spotted owl,
14 reducing by approximately one-third the amount of land in northern California that it considered
15 critical habitat for the Owl. 73 Fed. Reg. 47326 (Aug. 13, 2008).

16 76. In December 2012, the FWS again revised its critical habitat designation for the
17 Northern spotted owl increasing the amount of protected habitat similar to the 1992 levels due to
18 the continued decline of the species. 77 Fed. Reg. 71876 (Dec. 4, 2012).

19 **D. Recovery Planning for the Northern Spotted Owl**

20 77. In 2008, the FWS issued a Recovery Plan for the Northern spotted owl. 73 Fed. Reg.
21 29471 (May 21, 2008).

22 78. In September 2010, the FWS released a new draft revised Recovery Plan for the
23 Northern spotted owl. 75 Fed. Reg. 56131 (Sept. 15, 2010).

24 79. In July 2011, the FWS issued a final revised Recovery Plan for the Northern spotted
25 owl (“2011 Recovery Plan”). 76 Fed. Reg. 38575 (July 1, 2011). The 2011 Recovery Plan states
26 that it “is meant to be a stand-alone document that describes the steps necessary to recover the
27 spotted owl.”

28 80. Pursuant to the Mendocino National Forest Land and Resource Management Plan,

1 the 2011 Recovery Plan’s provisions regarding Northern spotted owl conservation are binding on
2 the USFS and the USFS must comply with the recommendations of the 2011 Recovery Plan as if
3 they were part of the Land and Resource Management Plan.

4 81. The 2011 Recovery Plan recognizes “past habitat loss and competition from Barred
5 owls, *Strix varia*, as the most pressing threats to spotted owl persistence.” *Id.* at 38576.

6 82. To address these threats, the 2011 Recovery Plan recommends increased habitat
7 protection for the Northern spotted owl in both occupied and unoccupied areas. *Id.*

8 83. One of the core provisions of the 2011 Recovery Plan is Recovery Action 10.
9 Recovery Action 10 contemplates that land managers will conserve all Northern spotted owl sites
10 and high value habitat to support a viable owl population. The 2011 Recovery Plan explains that
11 compliance with this recommendation “is especially important” in the short-term, until spotted
12 owl population trends improve.”

13 **E. The Smokey Project and Its Impacts on the Northern Spotted Owl**

14 84. The Smokey Project is located about 30 miles west of Elk Creek, California on the
15 Grindstone Ranger District of the Mendocino National Forest.

16 85. Then-Forest Supervisor Sherry A. Tune approved the Smokey Project in August
17 2012 on the basis of an EA, foregoing the preparation of an EIS on the basis of her finding that
18 implementation of the Smokey Project timber sale is not associated with any possibility of
19 significant environmental impacts.

20 86. Approximately 80% of the Smokey Project timber sale is within the Buttermilk LSR
21 and 75% of the Project is within formally designated Northern spotted owl critical habitat.

22 87. As noted above in this Second Amended Complaint, the area where the Smokey
23 Project timber sale is located appears to provide habitat for an important core population of
24 Northern spotted owls on the Mendocino National Forest. Nonetheless, the USFS failed to
25 adhere to the requirements of the 2012 Survey Protocol during the planning and decision-making
26 processes for the Smokey Project timber sale.

27 88. Specifically, the USFS did not survey for Northern spotted owls in all Northern
28 spotted owl nesting, roosting, and foraging habitat within the project area, as required by the

1 2012 Survey Protocol. Instead, the USFS limited its pre-decisional survey efforts to those five
2 historic northern spotted owl Activity Centers that overlapped with Smokey Project treatment
3 units.

4 89. This limited survey effort resulted in a situation where the USFS failed to utilize all
5 available information concerning northern spotted owl use and occupancy of the Smokey Project
6 area during project planning. Accordingly, the USFS and the FWS failed to use the best
7 scientific information available to locate Northern spotted owls that might be affected by the
8 Smokey Project.

9 90. The USFS has historical survey records showing that there are at least five Northern
10 spotted owl pairs that have Activity Center core areas that are within or just outside the Smokey
11 Project timber sale area. The Activity Centers themselves extend well into the Smokey Project
12 timber sale area. For example, Activity Centers 6082, 6084, and 3024 have core areas that are
13 within the Smokey Project area, but the USFS failed to survey Northern spotted owl habitat in
14 these Activity Centers during the project planning and decision-making processes.

15 91. The USFS has noted that barred owls are found at the perimeter of the Smokey
16 Project timber sale area. Since barred owls are present in the project area, there is a possibility
17 that Northern spotted owls may have abandoned – or been forced from – their historic Activity
18 Centers in the Smokey Project timber sale area and established new Activity Centers within the
19 project area.

20 92. In its Second Supplemental Biological Opinion for the Smokey Project, the FWS
21 acknowledges that Northern spotted owls in the project area appear to be shifting nest locations,
22 and posits that this shift in nest locations may be attributable to the presence of barred owls.

23 93. The movement of Northern spotted owls within the project area highlights the
24 importance of conducting 2012 protocol surveys throughout the entire Smokey Project area.

25 94. The risk posed by the USFS's failure to conduct pre-decisional Northern spotted owls
26 throughout the entire Smokey Project area was demonstrated by the fact that the USFS
27 "discovered" new owls in the project area *after* its decision, but during pre-implementation
28 surveys.

1 95. In light of the historical existence of numerous Northern spotted owls at the
2 periphery of the Smokey Project area, and in light of the mobility of owls within the project area,
3 it is essentially important that the entire project area be surveyed pursuant to the 2012 survey
4 protocol before project implementation commences.

5 96. The FWS's failure to require pre-decisional 2012 protocol surveys throughout the
6 entire project area as a condition for issuance of a Biological Opinion is arbitrary and capricious,
7 and inconsistent with the best available scientific information.

8 97. The relatively robust population of Northern spotted owls in the Smokey Project
9 timber sale area reflects the fact that the project is located in the Buttermilk LSR which contains
10 some of the best and most heavily utilized late successional habitat on the Mendocino National
11 Forest.

12 98. A number of USFS forest management actions have occurred previously in the
13 Buttermilk LSR, and still other USFS forest management actions are currently on-going or are
14 reasonably foreseeable. These other USFS management actions have impacts on the Northern
15 spotted owl and its habitat that are cumulative with the impacts of the Smokey Project.

16 99. As noted above in this Second Amended Complaint, the USFS has previously
17 determined that protection and enhancement of the late successional habitat in the Buttermilk
18 LSR will not be promoted by USFS management actions such as burning and thinning. For this
19 reason, the USFS determined in the Mendocino National Forest LSR Assessment that the
20 Buttermilk LSR should be a low priority for "treatments," and that the quantity of late
21 successional habitat in the Buttermilk LSR would be maximized by a "hands off" management
22 approach.

23 100. Correspondingly, the USFS found that fuel reduction "treatments" in the Buttermilk
24 LSR – such as burning and thinning – can result in Northern spotted owls abandoning their
25 Activity Centers.

26 101. Furthermore, and as discussed above, Northern spotted owls in the Mendocino
27 National Forest are particularly vulnerable to the adverse consequences of habitat disturbances
28 because of their location at the driest and hottest portion of the species' range and because of

1 competition with newly arrived barred owls.

2 102. The FWS has concluded that Northern spotted owls in the Smokey Project timber
3 sale area are likely already experiencing lower survival and population growth than other areas
4 within the range due to increased heat at the southern end of their range. The FWS concluded
5 that high quality habitat may therefore be much more important in this southern part of the range
6 as a mechanism to avoid heat stress that affects population growth.

7 **F. Planning and decision-making in connection with the Smokey Project timber sale**

8 103. The EA and FONSI which the USFS prepared in connection with Smokey Project
9 planning do not take the required “hard look” at the direct, indirect, and cumulative impacts
10 associated with implementation of the project as required by NEPA.

11 104. In light of the “context” and “intensity” of the Smokey Project, as those two terms
12 are used for the purposes of NEPA, it was arbitrary and capricious for the USFS to forego
13 preparation of an Environmental Impact Statement to assess the impacts of the project on
14 Northern spotted owls and Northern spotted owl habitat.

15 105. In connection with its NEPA analysis of the Smokey Project, the USFS
16 impermissibly failed to consider any alternative that complied with the 2011 Recovery Plan, or
17 that otherwise avoided adverse effects to owls and their habitat.

18 106. Furthermore, in light of post-decisional developments – including, but not limited
19 to, the discovery of new owls in the project area, the designation of new critical habitat, and the
20 USFS’s apparent decision to weaken the Limited Operating Periods adopted during the NEPA
21 process – the USFS has an obligation to conduct supplemental NEPA analysis.

22 107. During the planning process for the Smokey Project timber sale, numerous Northern
23 spotted owl experts expressed concern about the extent of management activity that the USFS
24 proposed in connection with the project.

25 108. Some Northern spotted owl experts expressed a belief that implementation of the
26 proposed project would lead to a result opposite to the stated purpose. That is, they concluded
27 that implementation of the Smokey Project would impair Northern spotted owl habitat in both
28 the short- and long-term, and also harm owl individuals.

1 109. Accordingly, the forest treatments authorized by the Smokey Project timber sale are
2 not only unnecessary, they are also counter-productive.

3 110. The FWS recommends that each Northern spotted owl Activity Center core area –
4 an area that measures 500 acres – have a minimum of 80 percent suitable habitat (defined as 50
5 percent or 250 acres of nesting/roosting habitat and 30 percent or 150 acres of foraging habitat).
6 In the Activity Center as a whole, the FWS recommends that there be 40 percent suitable habitat
7 (defined as 1,136 acres of nesting/roosting or foraging habitat).

8 111. The FWS has concluded that Northern spotted owl productivity and survivorship
9 are reduced when the proportion of suitable (nesting/roosting and foraging) habitat within the .5
10 mile core area of an activity center fails below 400 acres or 80 percent.

11 112. The FWS has concluded that Northern spotted owl productivity and survivorship
12 are reduced when the proportion of suitable Northern spotted owl habitat within an Activity
13 Center falls below 1,336 acres or 40 percent.

14 113. The FWS has concluded “incidental take” occurs – as that phrase is used in the ESA
15 – when the foraging habitat within an Activity Center falls below a threshold level of 1,085 acres.

16 114. In connection with the Smokey Project timber sale, the USFS authorized tree
17 cutting in some Activity Centers that are already deficient in critical habitat components. For
18 example, Activity Centers 3007, 3009, 3048, 3062, and 3063 are already below the FWS’s
19 recommended minimum habitat levels in the core area, and the USFS plans for the Smokey
20 Project timber sale include plans for additional cutting in these already habitat-deficient areas.

21 115. FWS biologists disagreed with the USFS’s determination that the project was not
22 likely to adversely affect Northern spotted owls. FWS biologists expressed particular concern
23 about the USFS’s proposal to authorize the cutting of a significant number of very large old trees
24 and the cutting of late successional reserve habitat, and explained to the USFS that the removal
25 of the large old trees would likely impair habitat values and the resident population of Northern
26 spotted owls.

27 116. Ultimately, the controversy between the FWS and the USFS as to the impacts of the
28 project on the Northern spotted owl was elevated to a more senior “management level” pursuant

1 to an interagency protocol. As a result of the elevation of that controversy, the USFS was
2 required to conduct a formal ESA Section 7 consultation with the FWS to analyze the impacts of
3 the project on Northern spotted owls and formally designated critical habitat.

4 117. The FWS determined that the formal Section 7 consultation process for the Smokey
5 Project timber sale would set a precedent for future Section 7 consultations between the FWS
6 and the USFS. A FWS biologist at the agency's Regional Office stated that the Smokey Project
7 consultation was a "complex" consultation "with lasting implications and layout for subsequent
8 complex consultations" and that "[a] good analysis and [Biological Opinion] for Smokey will
9 pave the way for several of Mendocino's other consultations in the que [sic]."

10 118. During the course of the formal ESA Section 7 consultation, the FWS reaffirmed its
11 position that the cutting of very large old trees was inappropriate and would harm the species and
12 its critical habitat. FWS biologists explained that the arrival of barred owls and the climatic
13 conditions at the southern-most extreme end of the Northern spotted owls' range made it
14 particularly important to maintain all occupied and available habitat.

15 119. The FWS's concerns about the adverse consequences of the Smokey Project timber
16 sale resulted in the FWS making a number of inquiries to the USFS for more specific information
17 as to project plans. These inquiries into important biological issues identified by the FWS led to
18 a delay in the issuance of a Biological Opinion, which marks the completion of the formal
19 Section 7 consultation process.

20 120. As a result of that delay, members of Congress wrote letters to the FWS expressing
21 their displeasure at the pace of the formal Section 7 consultation.

22 121. After congressional pressure was applied, the FWS softened its position with
23 respect to the impacts of the Smokey Project in order to accommodate the USFS's desire to
24 implement the project, as it had been designed by the USFS.

25 122. In March of 2012, the FWS issued its first Biological Opinion for the Smokey
26 Project timber sale. Subsequently, in August of 2012 the USFS issued a final decision
27 authorizing the Smokey Project timber sale.

28 123. The March 2012 Biological Opinion and the August 2012 final decision were

1 legally deficient in a number of respects, and did not comply with the mandatory requirements of
2 ESA, NEPA, NFMA, and the APA. Accordingly, Conservation Congress filed this action on
3 September 23, 2013 alleging that the Smokey Project decision was illegal and seeking an
4 injunction against implementation of the project.

5 124. The Fifth Claim for Relief of the original complaint alleged, in part, that the USFS
6 and FWS violated the ESA when the agencies failed to conduct an ESA Section 7 consultation as
7 to the impacts of the Smokey Project timber sale on formally designated critical habitat.

8 125. Shortly after Conservation Congress filed this action, the USFS suspended
9 implementation of the Smokey Project “due to ongoing litigation and the new biological analysis
10 needing to be performed.” Specifically, the USFS acknowledged – as Plaintiff had alleged in its
11 original complaint in this action – that it had failed to appropriately consult with the FWS as to
12 impacts of the Smokey Project on formally designated critical habitat.

13 126. The FWS issued a Supplemental Biological Opinion on November 3, 2014, and
14 Plaintiff thereafter filed its first amended complaint in this action.

15 127. In its first amended complaint, Plaintiff alleged, *inter alia*, that the Defendants
16 remained out of compliance with the ESA because the USFS and FWS had failed to consult as to
17 the impacts of the Smokey Project on all northern spotted owls in the project area, and not only
18 those owls known to exist as a result of previous survey efforts in “historic Activity Centers”

19 128. Again, shortly after the amended complaint was filed, the USFS acknowledged that
20 it was required to reinitiate consultation with the FWS because pre-implementation surveys in
21 the project area resulted in the “discovery” of previously unknown spotted owls in the project
22 area.

23 129. The Defendants’ third attempt to comply with the requirements of the ESA in
24 connection with the Smokey Project culminated in the FWS’s issuance of the Second
25 Supplemental Biological Opinion on July 24, 2015.

26 130. In its Second Supplemental Biological Opinion, the FWS found that
27 implementation of the Smokey Project would degrade 532 acres of nesting/roosting habitat,
28 1,790 acres of foraging habitat, and up to 2,138 acres of dispersal habitat. An additional 1,877

1 acres of non-suitable habitat would also be treated. All of the nesting/roosting habitat that would
2 be degraded and 1,202 acres of the foraging habitat that would be degraded would be degraded
3 by fuels reduction treatments. An additional 588 acres of foraging habitat would be degraded by
4 commercial thinning.

5 131. In its Second Supplemental Biological Opinion, the FWS concluded that the
6 Smokey Project's proposed treatments would degrade the quality of Northern spotted owl habitat
7 over the "short-term," defined by FWS as two to three years, and that owls may decrease or cease
8 use of treated habitat during that time. However, the Smokey Project will remove large trees,
9 much older than two to three years old. The FWS fails to explain how the removal of such large
10 trees over 100 years old will not have effects extending beyond two to three years. The adverse
11 effects are defined as reduction in multi-layered, multi-storied canopy, relatively high canopy
12 closure, presence of snags and coarse woody debris (which are important prey habitat),
13 alternation of microclimate in nesting/roosting habitat, and a reduction in cover from predators
14 which may temporarily displace Owls from nesting, roosting or foraging areas and increasing
15 inter- and intra-specific competition for suitable nesting, roosting, and foraging areas, among
16 other impacts.

17 132. In its Second Supplemental Biological Opinion, FWS also concludes that smoke
18 and noise from the Smokey Project could increase predation as Northern spotted owls and their
19 young flee, increase harm to juveniles due to flushing, increase smoke exposure, and otherwise
20 harm owls by disrupting thermoregulation.

21 133. The FWS concludes in the Second Supplemental Biological Opinion that the
22 Smokey Project is not consistent with Recovery Action 10 from the 2011 Recovery Plan.

23 134. The Second Supplemental Biological Opinion does not comply with the stringent
24 requirements of the ESA in various other respects.

25 135. As noted above, one of the critical flaws of the Second Supplemental Biological
26 Opinion is that it is based on inadequate and incomplete survey data.

27 136. In the absence of adequate survey data, and in light of the fact that the best available
28 population trend data shows that populations of Northern spotted owls are declining especially

1 quickly in northwestern California, it was irrational and arbitrary and capricious for the FWS to
2 determine that the project will not jeopardize the species or result in the destruction or adverse
3 modification of critical habitat.

4 137. As another example of the Second Supplemental Biological Opinion's legal
5 shortcomings, it fails to consider the best available scientific information concerning the
6 advisability of treating late successional habitat in the Buttermilk LSR, including information
7 that indicates that the sorts of treatments that the USFS is proposing in connection with the
8 Smokey Project is counter-productive and may cause Northern spotted owls to abandon their
9 Activity Centers.

10 138. Additionally, the Second Supplemental Biological Opinion violates the ESA
11 because the FWS fails to provide any rational explanation for its decision to weaken the Limited
12 Operation Periods which impose seasonal restrictions on actions in connection with the Smokey
13 Project timber sale.

14 139. The Limited Operating Periods incorporated into the Second Supplemental
15 Biological Opinion are significantly weaker and less protective than the Limited Operating
16 Periods incorporated into the original Biological Opinion, and the Limited Operating Periods in
17 the original Biological Opinion are in turn far less stringent and less protective than the Limited
18 Operating Periods recommended by the FWS at the outset of the ESA Section 7 consultation
19 process and assessed by the USFS during the NEPA process.

20 140. The Second Supplemental Biological Opinion also violates the ESA because the
21 Incidental Take Statement ("ITS") accounts only for the take that will occur within the historic
22 Activity Centers that have their core areas within the project area. The ITS fails to account for
23 any and all incidental take that occurs outside of those limited areas.

24 141. There is a significant amount of Northern spotted owl habitat in the project area that
25 has not been surveyed pursuant to the standards of the 2012 Survey Protocol, and there are
26 numerous historic Activity Centers in the project area that the USFS simply failed to survey at
27 all.

28 142. The Second Supplemental Biological Opinion fails to account for any incidental

1 take of Northern spotted owls that may occur outside of the five historic Activity Centers that
2 have their core areas in the Smokey Project timber sale area.

3 143. As another example of its inadequacy, the Second Supplemental Biological Opinion
4 fails to acknowledge the importance of the Buttermilk LSR – where the Smokey Project is
5 located – to the dispersal of northern spotted owls throughout the Mendocino National Forest and
6 beyond. Instead, the Second Supplemental Biological Opinion contains only cursory and
7 conclusory statements as to the Smokey Project’s impact on dispersal habitat.

8 **FIRST CLAIM FOR RELIEF**
9 **Violation of NEPA by USFS**
10 **(Failure to Take “Hard Look” at Impacts)**

11 144. Plaintiff re-alleges and incorporates the allegations in all preceding paragraphs of
12 this Second Amended Complaint herein by reference.

13 145. The USFS’ Environmental Assessment for the Smokey Project fails to take a hard
14 look at the direct and indirect impacts of the proposed action on the Northern spotted owl and its
15 designated critical habitat. Amongst other inadequacies, the USFS failed to analyze the impact
16 of the barred owls in the project areaproposed short-term degradation of habitat on the Northern
17 spotted owl and its prey, the importance of dispersal habitat, and the inconsistency of the Smokey
18 Project with the 2011 Recovery Plan.

19 146. Accordingly, for the reasons set forth above, the USFS’ actions and inactions are
20 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with NEPA or the
21 procedures required by law in violation of APA Sections 706(2)(A) & (D). 5 U.S.C. §§
22 706(2)(A), (D).

23 **SECOND CLAIM FOR RELIEF**
24 **Violation of NEPA by USFS**
25 **(Failure to Analyze Cumulative Impacts)**

26 147. Plaintiff re-alleges and incorporates the allegations in all preceding paragraphs of
27 this Second Amended Complaint herein by reference.

28 148. The USFS’ Environmental Assessment for the Smokey Project fails to analyze
cumulative impacts of the proposed action on the Northern spotted owl and its designated critical

1 habitat.

2 149. NEPA requires federal agencies to analyze the cumulative effects of their actions,
3 which result from the incremental impact of the action when added to other past, present, and
4 reasonably foreseeable future actions. 40 C.F.R. § 1508.25(a). The NEPA analysis for the
5 Smokey Project violates NEPA because it fails to account for the cumulative effects of the
6 Project together with other past, present, and reasonably foreseeable timber sales and other
7 ground-disturbing activities in the project area as well as in the Buttermilk LSR.

8 150. Accordingly, for the reasons set forth above, the USFS' action and inactions are
9 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with NEPA or the
10 procedures required by law in violation of APA Sections 706(2)(A) & (D). 5 U.S.C. §§
11 706(2)(A), (D).

12 **THIRD CLAIM FOR RELIEF**
13 **Violation of NEPA by USFS**
14 **(Failure to Prepare Environmental Impact Statement)**

15 151. Plaintiff re-alleges and incorporates the allegations in all preceding paragraphs of
16 this Second Amended Complaint herein by reference.

17 152. NEPA requires that an agency prepare a full EIS for a proposed project if there is a
18 possibility that implementation of the project may significantly impact the environment. In
19 determining whether "significant" impacts may occur in connection with the Smokey Project, the
20 USFS was required to look at the "context" and the "intensity" of the project. 40 C.F.R. §
21 1508.27.

22 153. In this case, an assessment of context and the intensity show that implementation of
23 the Smokey Project may result in significant impacts. Accordingly, the USFS was required to
24 prepare a full EIS, instead of an EA for the Smokey Project.

25 154. Accordingly, for the reasons set forth above, the USFS' actions and inactions are
26 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with NEPA or the
27 procedures required by law in violation of APA Sections 706(2)(A) & (D). 5 U.S.C. §§
28 706(2)(A), (D).

FOURTH CLAIM FOR RELIEF

1 **Violation of NEPA by USFS**
2 **(Failure to Develop a Reasonable Range of Alternatives)**

3 155. Plaintiff re-alleges and incorporates the allegations in all preceding paragraphs of
4 this Second Amended Complaint herein by reference.

5 156. NEPA requires USFS to consider a reasonable range of alternatives to the proposed
6 action. The alternatives analysis is the “heart” of the agency’s environmental analysis and the
7 USFS must rigorously explore and objectively evaluate all reasonable alternatives. 40 C.F.R. §
8 1502.14.

9 157. The USFS developed only one action alternative, the Smokey Project, for which it
10 determined a “may affect, not likely to adversely affect” in relation to the Northern spotted owl
11 and its designated critical habitat.

12 158. The USFS failed to adequately consider an alternative that does not enter designated
13 Northern spotted owl critical habitat, late successional reserves, or inventoried roadless areas.

14 159. The USFS prepared an unreasonably narrow purpose and need statement which led
15 to the paltry range of alternatives.

16 160. Therefore, the decision to proceed with the Smokey Project should be set aside, and
17 the Smokey Project enjoined until the USFS prepares a NEPA document that includes the
18 evaluation of a full range of reasonable alternatives.

19 161. Accordingly, for the reasons set forth above, the USFS’ actions and inactions are
20 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with NEPA or the
21 procedures required by law in violation of APA Sections 706(2)(A) & (D). 5 U.S.C. §§
22 706(2)(A), (D).

23 **FIFTH CLAIM FOR RELIEF**
24 **Violation of NEPA by USFS**
25 **(Post-decisional change in plan requiring supplemental NEPA analysis)**

26 162. Plaintiff re-alleges and incorporates the allegations in all preceding paragraphs of
27 this Second Amended Complaint herein by reference.

28 163. In the Environmental Assessment for the Smokey Project timber sale, the USFS
states that it would impose a Limited Operating Period restriction from February 1 through

1 September 15 for all areas that have not been cleared through protocol surveys. However,
2 recently obtained information indicates that the USFS intends to implement the Smokey Project
3 before September 15.

4 164. The USFS's decision to implement the Smokey Project in a manner inconsistent
5 with the Limited Operating Period set out in the Environmental Assessment is a significant
6 modification to the project with substantial effects which has never been subject to NEPA review
7 and, accordingly, it triggers the requirement for the USFS to prepare a supplemental NEPA
8 analysis.

9 165. Post-decisional circumstances – such as the designation of additional critical habitat
10 in the Smokey Project area and the discovery of additional northern spotted owls in the project
11 area – also trigger a requirement for supplemental NEPA analysis.

12 166. Accordingly, for the reasons set forth above, the USFS' actions and inactions are
13 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with NEPA or the
14 procedures required by law in violation of APA Sections 706(2)(A) & (D). 5 U.S.C. §§
15 706(2)(A), (D).

16 **SIXTH CLAIM FOR RELIEF**
17 **Violation of the ESA by FWS**
18 **(Arbitrary and Capricious Supplemental Biological Opinion)**

19 167. Plaintiff re-alleges and incorporates the allegations in all preceding paragraphs of
20 this Second Amended Complaint herein by reference.

21 168. The ESA requires that all Biological Opinions be based on the best available
22 scientific information. In this case, the Second Supplemental Biological Opinion which
23 concluded the ESA Section 7 consultation process was not based on the best available scientific
24 information.

25 169. Furthermore, the conclusions of the Second Supplemental Biological Opinion – that
26 implementation of the Smokey Project will neither jeopardize the Northern spotted owl or
27 destroy or adversely modify its critical habitat – are irrational, especially in light of the fact that
28 the project will degrade late successional habitat in the Buttermilk LSR that is already deficient

1 and in light of the fact that the USFS has not conducted 2012 Survey Protocol-level surveys
2 throughout the entire Smokey Project area.

3 170. The Second Supplemental Biological Opinion is also inadequate because the
4 Incidental Take Statement incorporated into the Opinion irrationally and arbitrarily fails to
5 account for the incidental take of Northern spotted owls that will occur outside of known Activity
6 Centers that have core areas inside the project area. The Incidental Take Statement also
7 arbitrarily and capriciously fails to minimize the extent of take authorized pursuant to the Second
8 Supplemental Biological Opinion, as specifically required by the ESA.

9 **SEVENTH CLAIM FOR RELIEF**
10 **Violation of ESA Section 7(a)(2) by USFS**
11 **(Failure to Insure Against Jeopardy and the Destruction or Adverse Modification of**
12 **Critical Habitat)**

13 171. Plaintiff re-alleges and incorporates the allegations in all preceding paragraphs of
14 this Second Amended Complaint herein by reference.

15 172. Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), imposes a substantive duty on
16 the USFS to avoid authorizing any projects that might jeopardize a species listed for ESA
17 protections, or that would adversely modifying or destroying a listed species critical habitat.

18 173. The USFS has violated that substantive ESA duty in connection with the Smokey
19 Project timber sale.

20 **EIGHTH CLAIM FOR RELIEF**
21 **Violation of the ESA Section 9 by USFS**
22 **(Illegal and Prohibited Take)**

23 174. Plaintiff re-alleges and incorporates the allegations in all preceding paragraphs of
24 this Second Amended Complaint herein by reference.

25 175. ESA Section 9 prohibits incidental take of listed species, except in those cases when
26 the incidental take is specifically allowed by a valid Incidental Take Statement that is
27 incorporated into a Biological Opinion.

28 176. As set forth above in the Sixth Claim for Relief, the Incidental Take Statement
incorporated into the Second Supplemental Biological Opinion for the Smokey Project timber

1 sale is invalid and illegal. Since there is no valid Incidental Take Statement, the anticipated
2 incidental take of Northern spotted owls that is anticipated in connection with implementation of
3 the Smokey Project is illegal, and constitutes a violation of Section 9 of the ESA.

4 **NINTH CLAIM FOR RELIEF**
5 **Violation of NFMA by USFS**
6 **(Failure to Comply for Forest Plan Standards and Guidelines)**

7 177. Plaintiff re-alleges and incorporates the allegations in all preceding paragraphs of
8 this Second Amended Complaint herein by reference.

9 178. NFMA requires that all projects comply with and be consistent with the relevant
10 Forest Plan.

11 179. The Mendocino National Forest Land and Resource Management Plan requires that
12 the USFS manage threatened and endangered species under existing recovery goals identified in
13 the species' recovery plan; to assure that management goals for threatened and endangered
14 species are being met as specified in the recovery plan; and to give precedence to activities
15 required by recovery plans for threatened and endangered species over certain other standards
16 and guidelines. The Land and Resource Management Plan also requires the USFS to assure that
17 all its actions are consistent with the 2011 Recovery Plan

18 180. The Smokey Project is inconsistent with the management direction set out in the
19 Land and Resource Management Plan and in the 2011 Recovery Plan.

20 181. The Mendocino National Forest LSR Assessment also imposes mandatory criteria
21 on the management of the forest in LSRS, and these criteria severely limit the number of large
22 old trees that may be cut in LSRS. The Smokey Project is not consistent with these criteria.

23 182. Accordingly, the USFS' actions as described above are arbitrary, capricious, an
24 abuse of discretion, and otherwise not in accordance with NFMA and its implementing
25 regulations in violation of the APA. 5 U.S.C. §§ 706(2)(A), (D).

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiff, Conservation Congress, respectfully requests the Court to grant
28 the following relief:

- 1 A. Declare that the USFS violated NEPA and its implementing regulations when it
2 authorized the Smokey Project;
- 3 B. Declare that the USFS violated the ESA and its implementing regulations when it
4 authorized the Smokey Project;
- 5 C. Declare that the USFS violated NFMA and its implementing regulations when it
6 authorized the Smokey Project;
- 7 D. Declare that the FWS’s Second Supplemental Biological Opinion violates the
8 ESA;
- 9 E. Issue a preliminary and/or permanent injunction enjoining the USFS from
10 proceeding with the Smokey Project until the Defendants fully comply with the
11 ESA, NEPA, NFMA, and the APA;
- 12 F. Award Plaintiff its costs of litigation, including reasonable attorney’s fees,
13 pursuant to the ESA, 16 U.S.C. § 1540(g)(4), and the EAJA, 28 U.S.C. § 2412;
14 and
- 15 G. Grant such additional relief as the Court may deem just and proper.

16
17
18 DATED: October 13, 2015

Respectfully Submitted,

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20
21 /s/ Steven Sugarman
22 Steven Sugarman
23 *Pro hac vice*
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