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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PRESCOTT DIVISION

CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB; and WILDEARTH GUARDIANS, Plaintiffs vs. UNITED STATES FOREST SERVICE; and UNITED STATES FISH AND WILDLIFE SERVICE, Defendants.	Case No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs Center for Biological Diversity, Sierra Club and WildEarth Guardians challenge the decision by the Defendant U.S. Forest Service ("Forest Service") to authorize and proceed with the Warm Fire post-fire logging project on the North Kaibab Ranger District of the Kaibab National Forest. Plaintiffs also challenge the determination and concurrence of the Defendant U.S. Fish and Wildlife Service ("FWS") that the Warm Fire logging project is not likely to adversely affect the threatened Mexican Spotted Owl or its designated critical habitat.

2. Plaintiffs seek declaratory relief that Defendants violated the National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA"), and National Forest Management Act ("NFMA") in developing and authorizing the Warm Fire logging project. Plaintiffs also seek injunctive relief to enjoin the Forest Service from implementing the Warm Fire project pending Defendants full compliance with the law.

JURISDICTION

3. Jurisdiction is proper in this Court under 28 U.S.C. § 1331, 5 U.S.C. §§ 551 *et seq.*, and 28 U.S.C. § 1346, because this action involves the United States as a defendant and arises under the laws of the United States, including NEPA, 42 U.S.C. §§ 4321 *et seq.*; the ESA, 16 U.S.C. §§ 1531 *et seq.*; NFMA, 16 U.S.C. §§1601 *et seq.*; and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*. An actual justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. § 2201-02 and 5 U.S.C. §§ 705 & 706. The challenged agency action is final and subject to this Court's review under 5 U.S.C. §§ 702, 704, and 706. Plaintiffs have exhausted all administrative remedies.

VENUE

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because the challenged Warm Fire logging project is located on federal lands within Arizona. In addition, Plaintiff Center for Biological Diversity's main office is located in Tucson, Arizona; and Plaintiffs Sierra Club and WildEarth Guardians have offices within the state. Defendants U.S. Forest Service and U.S. Fish and Wildlife Service also have offices within the district. Assignment is proper in the Prescott Division because the Warm Fire logging project is located in Coconino County.

PARTIES

5. Plaintiff Center for Biological Diversity is a non-profit corporation with approximately 60,000 members dedicated to the preservation, protection, and restoration of biodiversity and ecosystems throughout the world. The Center's main office is located in Tucson, Arizona. The Center also has an office in Flagstaff, Arizona. The Center works to insure the long-term health and viability of animal and plant species across the United States and elsewhere, and to protect the habitat these species need to survive.

6. Plaintiff Sierra Club is a non-profit, public interest environmental organization with over 700,000 members, whose mission is to explore, enjoy and protect

the planet. The Sierra Club has over 13,000 members in Arizona as part of its Grand Canyon Chapter. The Sierra Club has offices within Arizona, including Phoenix and Flagstaff.

7. Plaintiff WildEarth Guardians is a New Mexico, non-profit corporation with approximately 4,000 members throughout the United States, including Arizona. WildEarth Guardians has an office in Phoenix, Arizona. WildEarth Guardians' mission is to protect and restore the natural biological diversity of forests in the American Southwest, including the Kaibab National Forest. WildEarth Guardians brings this action on behalf of itself and its adversely affected members.

8. Plaintiffs' members use and enjoy the North Kaibab Ranger District of the Kaibab National Forest, including areas within the Warm Fire logging project and analysis area, for a variety of purposes including hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, and recreational activities. Plaintiffs' members derive recreational, inspirational, religious, scientific, educational, and aesthetic benefit from their activities within this national forest. Plaintiffs' members intend to continue to use and enjoy these federal lands frequently and on an ongoing basis in the future, including this summer and fall. Plaintiffs also have a procedural interest in the proper management of these federal lands that is in full compliance with mandatory environmental laws and regulations.

9. The aesthetic, recreational, scientific, educational, religious, and procedural interests of Plaintiffs and their members have been and will continue to be adversely affected and irreparably injured if Defendants implement the Warm Fire logging project as it is currently proposed. These are actual, concrete injuries caused by the Defendants' violations of NEPA, the ESA, and the NFMA. Plaintiffs and their members injuries will be redressed by the relief sought.

10. Defendant U.S. Forest Service ("Forest Service") is an agency within the U.S. Department of Agriculture. It and its officers are responsible for the lawful management

of the Kaibab National Forest.

11. Defendant U.S. Fish and Wildlife Service ("FWS") is an agency within the U.S. Department of the Interior. It and its officers are responsible for administering the ESA, particularly regarding potential impacts to freshwater fish and wildlife species that have been listed as threatened or endangered with extinction pursuant to the ESA.

FACTUAL ALLEGATIONS

The Kaibab Plateau and the North Kaibab Ranger District

12. The Kaibab Plateau is an uplifted "island" of high elevation forests surrounded on all sides by canyon country and desert habitats. Nestled among Grand Canyon National Park to the south, the Grand Staircase-Escalante National Monument to the north, and the proposed Vermilion Cliffs National Monument to the northeast, the Kaibab Plateau provides a central link between protected core areas of the southern Colorado Plateau.

13. The Kaibab Plateau encompasses over 1.5 million acres of the Arizona Strip. Most of the Plateau consists of the North Kaibab Ranger District of the Kaibab National Forest, managed by the U.S. Forest Service. The southern end of the Kaibab Plateau, the North Rim area, is within Grand Canyon National Park.

14. The Kaibab Plateau, rising to over 9,200 feet, supports a diverse mix of flora and fauna. Due to its altitude, the Plateau receives occasional heavy winter snows, and the Plateau is located far enough south to receive significant summer monsoonal moisture. Despite the cool temperatures and moisture, surface water is not common due to the porous nature of the Kaibab Limestone which caps much of the Plateau.

15. The crest of the Kaibab Plateau is heavily forested with spruce-fir, aspen, and mixed-conifer forests. Occasional subalpine grassland parks are scattered throughout the forests generally above 8500 feet. Stands of ponderosa pine and at lower elevations pinyon-juniper woodlands stretch from about 8000 feet down to about 5500 feet. A notable inhabitant of the Plateau's ponderosa pine forests is the Kaibab squirrel, found

only on the Kaibab Plateau.

16. Due in large part to its remoteness, the Kaibab Plateau contains some of the best remaining old growth ponderosa pine forest in the Southwest. The North Kaibab Ranger District, however, is extensively roaded and much of it has been logged.

The Mexican Spotted Owl

17. The Mexican Spotted Owl inhabits canyon and forest habitats across a range that extends from southern Utah and Colorado, through Arizona, New Mexico, and west Texas, to the mountains of central Mexico.

18. The Mexican Spotted Owl was listed by FWS as a threatened species in 1993. The primary reasons cited by FWS for the listing of the owl as threatened with extinction were the historical alteration of its habitat as the result of logging practices, and the threat of those practices continuing, and the danger of catastrophic wildfire.

19. A Recovery Plan was completed for the Mexican Spotted Owl in 1995. The Recovery Plan provides for three levels of habitat management: protected areas, restricted areas, and other forest and woodland types. Protected areas are defined to include all known owl sites and all areas in mixed-conifer or pine-oak types with slopes greater than 40 percent where timber harvest has not occurred in 20 years. Restricted areas include mixed-conifer forest, pine-oak forest, and riparian areas where potential nesting and roosting habitat exist.

20. FWS acknowledges that there is no reliable estimate of the number of Mexican Spotted Owls throughout its range. There may be as few as 2,160 of the owls remaining in the United States.

21. Approximately 8.6 million acres of critical habitat was designated for the Mexican Spotted Owl in 2004. The critical habitat represents FWS' best assessment of the areas that are essential to the conservation of the owl and that may require special management or protection. All areas designated as critical habitat for the Mexican Spotted Owl were found by FWS to be within the geographic area occupied by the owl.

The critical habitat designation includes both protected and restricted habitat for the Mexican Spotted Owl, and contains the primary constituent elements required by the owl.

22. The Mexican Spotted Owl critical habitat designation includes "Unit CP-10," identified as "Arizona Strip, and Kaibab National Forest, Coconino County, Arizona." This critical habitat unit is predominantly within the boundaries of the Kaibab National Forest and Grand Canyon National Park. The unit includes forested habitat within the North Kaibab Ranger District. There is considerable critical habitat designated for the Mexican Spotted Owl within the Warm Fire logging project area.

23. Between 1978 and 1991, there were 22 sightings of the Mexican Spotted Owl within the North Kaibab Ranger District of the Kaibab National Forest. In designating critical habitat for the Mexican Spotted Owl, FWS determined that this area is likely occupied by the Mexican Spotted Owl because of the frequency of past sightings and because the area contains canyon and forested habitat that is used by the owl.

24. When FWS designated critical habitat for the Mexican Spotted Owl, the agency identified the primary constituent elements for its forested habitat, including a range of tree species reflecting different ages of trees, 30 to 45 percent of which are large trees of 12 inches or more diameter at breast height; a shade canopy covering 40 percent or more of the ground; and large, dead trees (snags) that are at least 12 inches diameter at breast height.

25. There are scientific studies demonstrating the use of severely burned forests by northern, California, and Mexican spotted owls. High-severity wildfire creates an abundance of habitat features, including snags and large downed logs, that enhance the small mammal prey base for spotted owls. Scientific evidence demonstrates the use of low, moderate, and high severity burned forests by spotted owls for foraging habitat.

The Kaibab National Forest Plan

26. The Forest Service completed a Forest Plan for the Kaibab National Forest in 1987. The Kaibab Forest Plan has been amended a number of times since 1987. The

standards and guidelines included within the Kaibab Forest Plan are the bounds or constraints within which all management activities on the national forest are to be carried out.

27. The Kaibab Forest Plan divides the Kaibab National Forest into 11 geographically discrete "Geographic Areas" ("GAs"). GA 13 is located in the middle of the North Kaibab Ranger District. All of GA 13 is located within the Grand Canyon National Game Preserve.

28. The Kaibab Forest Plan requires the Forest Service to identify habitat management territories for threatened, endangered, and sensitive plant and animal species within GA 13 that are consistent with the conservation strategy and the recovery plan established for the species through on-the-ground surveys or record searches.

29. The Forest Service defines "sensitive species" as plant and animal species for which population viability is a concern, as evidenced by significant current or predicted downward trends in population numbers or density; and/or significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution.

30. The Forest Service's objective for sensitive species is to maintain viable populations in habitats that are distributed throughout their geographic range on National Forest System lands.

31. The Forest Service defines "viable population" as a population that has the estimated numbers and distribution of reproductive individuals to ensure the continued existence of the species throughout its existing range within the planning area.

32. Forest Supervisors are to determine the distribution, status, and population trend of all sensitive species and their habitats on lands managed by the Forest Service.

33. For projects located within GA 13, the Kaibab Forest Plan requires the Forest Service to prepare a biological assessment and evaluation in order to document the effect of the project on the viability of the population of sensitive species within the ecosystem management area.

34. Sensitive wildlife species that are found within the North Kaibab Ranger District of the Kaibab National Forest include the Northern goshawk, peregrine falcon, Utah Mountain kingsnake, Allen's lappet-browed bat, long-tailed vole, Kaibab least chipmunk, and Kaibab squirrel.

35. The Forest Service has not determined and has not disclosed the current population, population trend, or population distribution for a number of sensitive wildlife species that occur on the Kaibab National Forest, including the Allen's lappet-browed bat and the long-tailed vole. The Forest Service does not know how many Allen's lappet browed bats or long-tailed voles remain on the Kaibab National Forest. The Forest Service does not know the current distribution of Allen's lappet browed bats or long-tailed voles on the Kaibab National Forest.

36. The Kaibab Forest Plan was significantly amended in 1996 to include standards and guidelines for the Mexican Spotted Owl. Restricted areas for the Mexican Spotted Owl are identified as all mixed-conifer, pine-oak, and riparian forests outside of the protected areas.

37. Within restricted areas, the Kaibab Forest Plan includes minimum, numeric standards for "basal area," and the number of trees that are 18 inches or greater per acre. The Forest Plan also includes numeric standards for the percentage of each forested stand that must be between 12-18 inches in diameter, 18-24 inches in diameter, and over 24 inches in diameter.

38. The Kaibab Forest Plan requires the Forest Service to save all trees greater than 24 inches in diameter within the Mexican Spotted Owl restricted areas.

39. The Kaibab Forest Plan standards and guidelines for the Mexican Spotted Owl provide for no exceptions or special considerations for post-fire logging projects.

The 2006 Warm Fire; 2007 "Hazard Tree" Project; and 2009 Warm Fire Logging Project

40. The Warm Fire was started by lightning on June 8, 2006. The fire was initially managed as wildland fire use, during which time approximately 19,000 acres

burned.

41. On June 25, 2006, the Warm Fire escaped the boundaries established by the Forest Service, and management of the fire was changed to a fire suppression strategy. Another 39,110 acres burned after June 25th, with much of this burning at high severity, with severe fire effects. The fire fighting tactics and suppression efforts included over 30 miles of bulldozed fire-lines and thousands of acres of intentional back-burning.

42. The Warm Fire was contained on July 3, 2006, controlled on August 9th, and declared out on September 14, 2006. A total of 58,622 acres burned during the combined wildland fire use and wildfire/suppression.

43. On July 1, 2006, the Forest Service assembled a team to begin assessing and initiating the rehabilitation of the burned areas. The Forest Service conducted rehabilitation work within the Warm Fire area, including repairing storm damaged roads and the seeding of approximately 10,000 acres.

44. On August 1, 2006, the Forest Service began an assessment entitled "Warm Fire Assessment Post Fire Conditions and Management Considerations." The Forest Service determined that 41% of the Warm Fire (16,026 acres) was a low severity burn. The remaining portions of the fire burned at moderate to high severities.

45. Following the Warm fire, the Forest Service recognized that there were small un-mapped populations of cheatgrass in and around the burn area that presented a significant threat to ecosystem integrity and long-term soil productivity. The Forest Service further recognized that there was a concern that fire suppression activities could have brought in seeds of numerous species of invasive and noxious plants.

46. On December 28, 2006, the Forest Service published its notice of intent to prepare an "environmental impact statement" ("EIS") for its proposed Warm Fire logging project.

47. On January 26, 2007, the Arizona Department of Game and Fish ("ADGF") submitted its initial comments on the Warm Fire logging project. ADGF commented that

the North Kaibab Ranger District had extensive areas of non-native species, including cheatgrass. ADGF further commented that there is a growing body of literature suggesting that cheatgrass is now invading areas of higher elevation. ADGF encouraged the Forest Service to work with the Grand Canyon Trust on a plan for a GIS-based model predicting the distribution and abundance of invasive, non-native species, including cheatgrass.

48. On July 19, 2007, the Forest Service signed a decision to log "hazard" trees along the highways and Forest Service roads and trails within the Warm Fire area. Most of these logged trees will be removed, although some will remain on the ground. The hazard tree decision authorizes the Forest Service to annually review the Warm Fire area for approximately five years to determine which hazard trees should be logged and removed. Logging was authorized on about 82 miles of roads, from approximately 2,247 acres. The hazard tree logging is currently ongoing.

49. The Forest Service entered into formal consultation with FWS regarding the potential impacts of the "hazard tree" project on the Mexican Spotted Owl. On June 26, 2007, FWS completed a biological opinion on the hazard tree project. While FWS concluded that the project is not likely to jeopardize the continued existence of the Mexican Spotted Owl, the biological opinion discusses a number of adverse affects that are likely to occur to the Owl and its designated critical habitat. The biological opinion determined that the hazard tree project will adversely affect key habitat components including large snags and large down logs in the 864 acres of Mexican Spotted Owl habitat within the treatment units, and that the project would lead to further habitat fragmentation, reducing the value of the area for dispersing and foraging owls.

50. In January, 2008, the Forest Service completed a draft EIS and biological assessment for the Warm Fire logging project.

51. On August 12, 2008, FWS issued a "letter of concurrence" on the Warm Fire logging project, concurring with the Forest Service's determination that the Warm Fire

logging project "may affect, but is not likely to adversely affect" the Mexican Spotted Owl or its critical habitat. The FWS letter of concurrence acknowledged that the Warm Fire logging project would log 3,460 acres of Mexican Spotted Owl restricted habitat and designated critical habitat.

52. In March, 2009, the Forest Service released the final EIS for the Warm Fire logging project, and signed the Record of Decision for the project. The Forest Service decided to implement alternative 2, as set forth in the EIS.

53. The Warm Fire project area is located 14 miles north of the Grand Canyon National Park boundary, within the Grand Canyon National Game Preserve. The project area is also within GA 13 of the Kaibab Forest Plan.

54. The Forest Service identified three "purposes and needs" for the Warm Fire logging project: (1) recover the economic value of the burned trees; (2) reforest burned conifer stands; and (3) break up the fuel continuity in the project area.

55. The Forest Service decision for the Warm Fire logging project includes tractor logging burned trees on approximately 9,000 acres. The volume to be logged is estimated to be approximately 73 million board feet, which roughly equates to about 14,500 truckloads of trees.

56. The current road density in the project area is 6.9 miles per square mile. While no new logging roads would be constructed as part of the Warm Fire logging project, the Forest Service would reconstruct and re-open 95 miles of older, existing roads that are currently closed.

57. The Warm Fire logging project would log only fire-killed trees that do not have any green needles. The project would only log trees that are over 14 inches diameter at breast height. The project would leave 5 to 7 of the large dead trees per acre within areas designated as critical habitat for the Mexican Spotted Owl.

58. The Forest Service has identified invasive species as one of the four primary threats to the National Forest System. One non-native invasive plant species on the

Kaibab National Forest is cheatgrass, an annual grass from Europe that can grow to a height of two feet.

59. Cheatgrass is reported to achieve initial dispersal into new habitats along roads and trails, and it can disperse along skid trails and burn piles. Cheatgrass has been found to often dominate plant communities after intense wildfire. Cheatgrass has a relatively short growth period, drying out sooner than other native plants. Standing dead cheatgrass is very flammable.

60. The short growth period for cheatgrass increases the risk of wildfire starts and spread. The spread of cheatgrass may change fire patterns, and the presence of cheatgrass can increase fire frequency.

61. After a wildfire the normally self-pollinating cheatgrass plants are more likely to cross-pollinate, filling the environment with cheatgrass plants exhibiting hybrid vigor. Vigorous cheatgrass plants are better adapted to efficiently utilize nutrients and soil water than native plants after a wildfire.

62. The disturbances that are created by wildfire fire-fighting and suppression, including bulldozer-constructed fire lines and fire camps, create a strong potential for the introduction and spread of non-native invasive species, including cheatgrass.

63. Large infestations of cheatgrass are currently found throughout the Warm Fire planning area. Because the chosen alternative (Alternative 2) proposes to impact the most acres, it poses the strongest risk of the spread of non-native invasive species of all the action alternatives.

64. The Forest Service fuels report for the Warm Fire logging project does not consider the presence or spread of cheatgrass on future fire risk and intensity.

65. There are three categories of dead surface fuels that affect fire behavior: fine fuels, small woody fuels, and large woody fuels.

66. “Fine fuels” are defined as grasses or forbs, and would include cheatgrass where it is present.

67. "Small woody fuels" are defined as those less than 3 inches in diameter. Once small woody fuel loadings exceed 8 to 10 tons per acre, fire hazard increases substantially. The Warm Fire logging project would significantly increase the amount of small woody fuels on the ground for at least the first couple of decades, with an estimated 22 tons per acre by 2012, and 12 to 24 tons per acre as late as 2027.

68. "Large woody fuels," also referred to as "coarse woody debris" is typically defined as standing and down pieces that are larger than 3 inches in diameter. In implementing the Warm Fire logging project, the Forest Service would retain on site an average of at least 15 to 20 tons per acre of "coarse woody debris" in all harvest units.

69. The amount of coarse woody debris would significantly increase following implementation of the Warm Fire logging project, with 29% of the area above acceptable levels by 2012, 52% of the area above acceptable levels by 2027, and 40% of the area above acceptable levels in 2047.

70. Acceptable levels of coarse woody debris depend on the levels of small woody fuels within the same area. The recommended ranges of coarse woody debris quantities should be modified by consideration of factors such as the quantity of small woody fuel within the same area, and the diameter of the coarse woody debris. The optimum quantity of up to 20 tons per acre of coarse woody debris for acceptable fire hazard is only appropriate when accompanied by small fuel loadings of about 5 tons per acre or less.

71. Coarse woody debris in the range of 3 to 6 inches in diameter have a much different effect on future fire risk and intensity than coarse woody debris in excess of 6 inches in diameter. Despite the high levels of small woody debris predicted through implementation of the Warm Fire logging project, the Warm Fire EIS does not consider or disclose the cumulative amounts or impacts of coarse woody debris in the range of 3 to 6 inches in diameter along with small woody fuels (those less than 3 inches in diameter) in predicting future fire risk and intensity.

72. Despite the acknowledgment that there are three categories of dead surface fuels that affect fire behavior, the Forest Service does not estimate or disclose the cumulative increase or total amounts of fine fuels, small woody fuels, and large woody fuels following implementation of the Warm Fire logging project.

73. Plaintiffs submitted extensive comments on the Warm Fire logging proposal during the NEPA process. On May 14, 2009, Plaintiffs submitted an administrative appeal of the Warm Fire logging project to the Forest Service. On June 29, 2009, the Forest Service denied Plaintiffs administrative appeal of the Warm Fire logging project.

STATUTORY BACKGROUND

The Endangered Species Act

74. The ESA requires federal agencies to consult with FWS to insure that any proposed action is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the adverse modification of critical habitat for such species. 16 U.S.C. § 1536(a)(2). In consulting under Section 7 of the ESA, each agency must use the best scientific information and data that is available. *Id*.

75. To facilitate compliance with the ESA consultation requirement, federal agencies must ask FWS whether any listed or proposed species may be present in the area of the proposed action. 16 U.S.C. § 1536(c)(1). If listed species may be present, the agency must prepare a biological assessment to identify any threatened or endangered species which are likely to be affected by such action. *Id.*

76. If an action agency determines that a proposed action may adversely affect a listed species or critical habitat, it must engage in formal consultation with FWS. 50 C.F.R. §§ 402.12, 402.14. FWS must provide the action agency with a "biological opinion" explaining how the proposed action will affect the species or its habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14. If FWS concludes in a biological opinion that the proposed action will not jeopardize a listed species or result in the adverse modification of critical habitat, the biological opinion must still include an incidental take

statement, including mandatory terms and conditions to minimize any impacts to listed species and monitoring and reporting requirements. *See* 50 C.F.R. § 402.14(i).

77. Alternatively, an action agency may engage in informal consultation with FWS. If the action agency determines through informal consultation - with the written concurrence of FWS - that a proposed action is not likely to adversely affect listed species or critical habitat, the consultation process can be terminated and formal consultation avoided. 50 C.F.R. § 402.13.

The National Forest Management Act

78. The National Forest Management Act ("NFMA") sets forth a three-tiered approach to forest management. At the highest tier, NFMA requires the Forest Service to promulgate national regulations that govern the development of regional and site-specific plans. 16 U.S.C. § 1604(g). The national regulations require the Forest Service to set standards and guidelines regarding forest resources, including providing for the diversity of plant and animal communities. *Id*.

79. The second tier of regulatory oversight on national forest system lands is the "land and resource management plan" ("Forest Plan") that is prepared for each individual national forest. 16 U.S.C. § 1604(a).

80. The third tier is the "site-specific" projects, which are prepared to effect specific, on-the-ground actions. Site-specific projects must be consistent with both the applicable Forest Plan as well as the nationwide NFMA regulations. 16 U.S.C. § 1604(i).

81. Pursuant to NFMA, the Forest Service must demonstrate that a site-specific project would be consistent with the standards and guidelines of the applicable Forest Plan. 16 U.S.C. § 1604(i); *see also Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1377 (9th Cir. 1998).

The National Environmental Policy Act

82. NEPA requires federal agencies to consider the environmental consequences of their actions. 42 U.S.C. § 4331 *et seq*. NEPA ensures that the agency will have

available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to a larger audience to ensure the public can play a role in both the decisionmaking process and the implementation of the agency's decision. NEPA requires federal agencies to prepare a detailed "environmental impact statement" ("EIS") for any major Federal action that may significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C).

83. The information in an EIS must be of high quality. 40 C.F.R. § 1500.1(b). Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. *Id*.

84. An EIS must include a discussion of means to mitigate adverse environmental impacts. 40 C.F.R. § 1502.16; *see also id.* at §§ 1502.14(f), 1508.20. An agency cannot rely on a list of mitigation measures that are not supported with analytical data.

85. Agencies must insure the professional integrity, including the scientific integrity, of the discussions and analyses in an EIS. 40 C.F.R. § 1502.24. The agency shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. *Id*. NEPA requires that the public receive the underlying environmental data from which an agency expert derived her opinion.

86. In determining the proper scope of a NEPA analysis, federal agencies must broadly consider the environmental impacts of their actions and related actions. 40 C.F.R. § 1508.25. Federal agencies must not only review the direct impacts of their actions, but also analyze indirect and cumulative impacts. *Id*. Indirect effects are those "caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b).

87. To comply with NEPA, agencies must consider cumulative impacts. Cumulative impacts include impacts of "other past, present, and reasonably foreseeable

future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. In order to properly consider cumulative impacts, quantified and detailed information is required.

FIRST CLAIM FOR RELIEF

FWS's Letter of Concurrence on the Impacts of the Warm Fire Logging Project on the Mexican Spotted Owl and Its Critical Habitat is Arbitrary, Capricious, and Violates the ESA

88. Plaintiffs hereby incorporate by reference all preceding paragraphs.

89. On August 12, 2008, FWS concurred with the Forest Service's determination that the Warm Fire logging project is not likely to adversely affect the Mexican Spotted Owl or its critical habitat.

90. In concurring with the Forest Service's determination for the Mexican Spotted Owl, FWS failed to rationally consider and explain a number of relevant factors, including but not limited to its earlier determination that the much smaller Warm Fire hazard tree project would adversely affect the Mexican Spotted Owl and its critical habitat; its earlier determination that the Mexican Spotted Owl is likely to occur within the North Kaibab Ranger District of the Kaibab National Forest; and available scientific evidence demonstrating the use of burned habitats by spotted owls.

91. Because FWS concurred with the Forest Service's "not likely to adversely affect" determination for the Mexican Spotted Owl, no biological opinion was prepared for the Warm Fire logging project, and therefore no incidental take statement was prepared that would have required that impacts to the Mexican Spotted Owl be minimized through mandatory terms and conditions, and which would have included monitoring and reporting requirements. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

92. FWS' letter of concurrence that the Warm Fire logging project is not likely to adversely affect the Mexican Spotted Owl or its critical habitat is arbitrary, capricious, an abuse of discretion, and in violation of Section 7 of the ESA. 5 U.S.C. § 706(2)(A). The FWS letter of concurrence should be held unlawful and set aside. *Id*. at § 706(2).

SECOND CLAIM FOR RELIEF

The Forest Service Failed to Insure and Demonstrate that the Warm Fire Logging Project Will Comply with Forest Plan Standards and Guidelines for the Mexican Spotted Owl, In Violation of NFMA and NEPA

93. Plaintiffs hereby incorporate by reference all preceding paragraphs.

94. Pursuant to NFMA, the Forest Service must demonstrate that the Warm Fire logging project would be consistent with the Kaibab Forest Plan. 16 U.S.C. § 1604(i). Similarly, in order to comply with NEPA's disclosure requirements, the Warm Fire EIS must explain and disclose how the Warm Fire project will comply with the Kaibab Forest Plan standards and guidelines.

95. The Warm Fire logging project EIS fails to analyze and disclose whether the proposed logging project would comply with the Kaibab Forest Plan's standards and guidelines for the Mexican Spotted Owl.

96. By failing to demonstrate compliance with the Kaibab Forest Plan requirements for the Mexican Spotted Owl within the Warm Fire logging project EIS, the Forest Service has violated both NEPA and NFMA. The Forest Service's decision to proceed with the Warm Fire logging project is therefore arbitrary, capricious, an abuse of discretion, and contrary to law. 5 U.S.C. § 706(2)(A). The project should therefore be held unlawful and set aside. *Id*. at § 706(2).

THIRD CLAIM FOR RELIEF

The Forest Service's Analysis of the Impacts of the Warm Fire Logging Project on Sensitive Wildlife Species Violates NFMA and NEPA

97. Plaintiffs hereby incorporate by reference all preceding paragraphs.

98. Pursuant to NFMA, the Forest Service must demonstrate that the Warm Fire logging project would be consistent with the Kaibab Forest Plan. 16 U.S.C. § 1604(i). Similarly, to comply with NEPA's disclosure requirements, the Warm Fire EIS must explain and disclose how the Warm Fire project will comply with the Kaibab Forest Plan standards and guidelines.

99. For a number of sensitive wildlife species, the Forest Service has failed to

analyze and disclose within the Warm Fire logging project EIS or biological evaluation the effect of the Warm Fire logging project on the viability of the population of the sensitive wildlife species within the ecosystem management area.

100. Even though the Forest Service acknowledges adverse impacts to a number of sensitive species as result of the Warm Fire logging project, neither the EIS nor the biological evaluation provide any objective information on the populations of the affected sensitive wildlife species within the ecosystem management area, either before or after the proposed logging project. Without such information, there is no rational basis to determine or conclude what the effects of the Warm Fire logging project will be on the viability of these sensitive populations within the ecosystem management area.

101. The Forest Service failure to analyze and disclose the impacts of the Warm Fire project on the viaiblity of the populations of sensitive species within the ecosystem management area violates the Kaibab Forest Plan, NFMA, and NEPA. *See* 16 U.S.C. § 1604(i). The Forest Service's decision to proceed with the Warm Fire logging project is therefore arbitrary, capricious, an abuse of discretion, and contrary to law. 5 U.S.C. § 706(2)(A). The project should therefore be held unlawful and set aside. *Id*. at § 706(2).

102. In both the biological evaluation and EIS, the Forest Service concludes that the Warm Fire logging project may affect the "local populations" of sensitive species such as the Allen's Lappet-browed bat and long-tailed vole, but that the logging project "is not likely to affect the population trend" of the sensitive species. The Forest Service provides the public with no objective environmental data or analysis to support these summary conclusions, in violation of NEPA. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998); 40 C.F.R. § 1502.24. The Forest Service's decision to proceed with the Warm Fire logging project is therefore arbitrary, capricious, an abuse of discretion, and contrary to law. 5 U.S.C. § 706(2)(A). The project should therefore be held unlawful and set aside. *Id*. at § 706(2).

FOURTH CLAIM FOR RELIEF

The EIS Prepared for the Warm Fire Logging Project Violates NEPA

103. Plaintiffs hereby incorporate by reference all preceding paragraphs.

104. The EIS prepared for the Warm Fire logging project is legally inadequate, and in violation of NEPA, for a number of reasons, including the following:

a) the EIS fails to demonstrate compliance with applicable Forest Plan standards and guidelines for the Mexican Spotted Owl and sensitive wildlife species, as explained above;

b) the EIS fails to adequately support its conclusions concerning impacts to sensitive wildlife species resulting from the Warm Fire logging project with objective, hard data and analysis;

c) the EIS fails to consider and provide quantified, detailed information concerning the overall cumulative effects of cheatgrass expansion on future fire risk and intensity, resulting from the Warm Fire, the Warm Fire fire-fighting and suppression, the Warm Fire hazard tree project, and the Warm Fire logging project;

d) the EIS fails to adequately support its conclusions and mitigation measures concerning cheatgrass expansion resulting from the Warm Fire logging project with objective, hard data and analysis;

e) the EIS underestimates future fire risk and intensity resulting from the Warm Fire logging project by failing to objectively and adequately consider, assess and disclose relevant factors, including cheatgrass expansion, impacts on aspen regeneration, and the cumulative increase and overall amounts of fine fuels, small woody fuels, and small diameter coarse woody debris (3 to 6 inches in diameter); and

f) the EIS fails to insure the scientific integrity, and fails to disclose and address conflicting scientific evidence, concerning the Forest Service's chosen alternative and the analysis of future fire risk and intensity resulting from implementation of the chosen alternative.

105. The Warm Fire logging project EIS does not satisfy the purpose, intent, or mandatory requirements of NEPA. The Forest Service's failure to prepare an adequate, objective, and scientifically supported EIS is not in accordance with NEPA, not in accordance with procedures required by NEPA, and constitutes arbitrary and capricious agency action, and an abuse of discretion. 5 U.S.C. § 706(A)(2). The Warm Fire logging project should therefore be held unlawful and set aside. *Id*. at § 706(2).

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that FWS violated the ESA in determining and concurring that the Warm Fire logging project is not likely to adversely affect the Mexican Spotted Owl or its critical habitat;

B. Declare that Forest Service has failed to demonstrate the compliance of the Warm Fire logging project with applicable provisions of the Kaibab Forest Plan regarding the Mexican Spotted Owl and sensitive wildlife species, in violation of NFMA and NEPA;

C. Declare that the EIS prepared by the Forest Service for the Warm Fire logging project violates NEPA;

D. Enjoin the Forest Service from any implementation of the Warm Fire logging project unless and until it has fully complied with all applicable laws;

E. Award to Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees pursuant to applicable law including the Equal Access to Justice Act, 28 U.S.C. § 2412; and

F. Grant Plaintiffs such further relief as may be just, proper, and equitable.

Dated this 6th day of July, 2009. Respectfully submitted,

/s/ Marc D. Fink
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