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13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA
15 SACRAMENTO DIVISION

16 SIERRA NEVADA FOREST PROTECTION)
17 CAMPAIGN, SIERRA CLUB, and LASSEN)
18 FOREST PRESERVATION GROUP,)

19 Plaintiffs,)

20 v.)

21 LAURIE TIPPIN, in her official capacity as Forest)
22 Supervisor of the Lassen National Forest;)
23 BERNARD WEINGARDT, in his official capacity)
24 as Regional Forester; and UNITED STATES)
25 FOREST SERVICE,)

26 Defendants.)

Case No: 2:06-CV-00351-FCD-DAD

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

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INTRODUCTION

1. This is a civil action for declaratory and injunctive relief. Plaintiffs challenge the Forest Service’s decision to approve the Creeks Forest Health Recovery Project on the Almanor Ranger District of the Lassen National Forest. Plaintiffs allege that defendants’ approval of the project violates the National Environmental Policy Act, the National Forest Management Act, and the regulations implementing these statutes. Plaintiffs seek a declaration that the Creeks project is contrary to law and an injunction setting aside the decision and prohibiting defendants from implementing the Creeks project.

2. The Creeks project authorizes over 10,000 acres of intensive logging in an ecologically important area. The project will degrade habitat for imperiled and sensitive species that inhabit old forests, including the California spotted owl, American marten, and Pacific fisher, and will threaten the viability and distribution of these species in the planning area, contrary to law. The environmental impact statement (EIS) fails to take a hard look at these impacts in light of the best available scientific information. In addition, the EIS fails to consider reasonable alternatives, including alternatives involving less intensive logging, despite public comments requesting that such alternatives be analyzed in detail.

JURISDICTION AND VENUE

3. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under federal law.

4. There exists now between the parties an actual, justiciable controversy. Plaintiffs have exhausted their administrative remedies and the Forest Service’s decision dismissing plaintiffs’ administrative appeal constitutes the final administrative determination of the Department of Agriculture.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) because the Forest Service land that is the subject of this dispute is located in Plumas County within this judicial district.

1 the Lassen National Forest. The Group's primary focus is to protect old forests, watershed and
2 riparian habitats, and sensitive and endangered species. Beginning in 1997 the Group has monitored
3 all proposed activities on the Lassen National Forest and has commented on and appealed numerous
4 timber sales. The Group and its members have participated in numerous meetings, field trips, and
5 educational opportunities with the Forest Service, including meetings relating to the Creeks project.
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7 8. Plaintiffs have individual members who live and work near and visit the Lassen National
8 Forest, including the Creeks project area. They use these national forest lands for a variety of
9 purposes, such as hiking, backpacking, skiing, photography, scientific study, wildlife observation,
10 hunting and fishing, and intend to continue to do so on an ongoing basis in the future. Plaintiffs'
11 members derive recreational, spiritual, professional, aesthetic, educational and other benefits and
12 enjoyment from these activities.

13 9. The Creeks project, if implemented as currently planned, will adversely affect plaintiffs'
14 members' use and enjoyment of the project area by logging medium and large trees, reducing forest
15 canopy cover, and related activities that will reduce the area's value as habitat for species associated
16 with older forests, such as the California spotted owl and American marten.

17 10. Plaintiffs have a long history of involvement in planning and decision making for the
18 Lassen National Forest, including specifically the Creeks project area. Plaintiffs made an extensive
19 site visit of the project, filed written comments on the Creeks proposal, and filed an administrative
20 appeal of the project. Plaintiffs have been, are being, and will continue to be adversely affected and
21 irreparably injured by the decision challenged in this case. These injuries are actual and concrete
22 and would be redressed by the relief sought herein. Plaintiffs have no adequate remedy at law.
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24 11. The defendants in this action are:

25 a. LAURIE TIPPIN is the Forest Supervisor for the Lassen National Forest and signed the
26 record of decision approving the Creeks project. She is sued in her official capacity.
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1 the project area. As a result of past logging, habitat for species associated with older forests has
2 declined. However, the California spotted owl and American marten still inhabit portions of the
3 project area.
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5 15. The California spotted owl is closely associated with the structural attributes of older
6 forests in the Sierra Nevada, including medium and large trees, dense canopy cover, and large snags
7 and down logs. Preferred habitat for the California spotted owl consists of mixed conifer forests
8 dominated by trees larger than 24 inches in diameter and with 70 percent or greater canopy cover for
9 nesting and roosting and 50 percent or greater canopy cover for foraging. Demographic studies
10 indicate an alarming decline in the owl's population in the Creeks project area. Scientists have
11 expressed significant concern about the owl's population throughout the Sierra Nevada and the U.S.
12 Fish and Wildlife Service has determined that the California spotted owl may merit listing under the
13 Endangered Species Act.

14 16. The Pacific fisher is a forest carnivore that currently inhabits dense, older forests in the
15 southern Sierra Nevada, a small portion of its historic range in the Sierra Nevada. The U.S. Fish and
16 Wildlife Service concluded in 2004 that the west coast population of the fisher warrants listing under
17 the Endangered Species Act. 69 Fed. Reg. 18769 (April 8, 2004). According to the Service, logging
18 and related road construction "have likely played significant roles in both the loss of fishers from the
19 central and northern Sierra Nevada and the fisher's failure to recolonize those areas." *Id.* at 18778.
20 Scientists agree that ensuring the viability of the fisher in the Sierra Nevada requires that the fisher
21 recolonize the central and northern Sierra Nevada. Therefore, protecting and restoring fisher habitat
22 in the central and northern Sierra Nevada, including the Creeks project area, is an important step
23 towards ensuring the fisher's viability throughout the Sierra Nevada.
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25 17. The American marten, a smaller relative of the Pacific fisher, is also closely associated
26 with dense, older forests. The marten is highly sensitive to forest openings and fragmentation
27 caused by logging, road construction and related activities. The best available research indicates that
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1 a significant gap exists in the marten’s current distribution in the northern Sierra Nevada,
2 particularly outside of national parks and wilderness areas, including in the vicinity of the Creeks
3 project. The apparent absence of the marten in this portion of its historical range increases the
4 likelihood that remaining populations are isolated and makes them more prone to extirpation as a
5 result of increased logging.

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7 18. The Forest Service has designated the California spotted owl, Pacific fisher, and
8 American marten as “sensitive” species due to their close association with old forests.

9 19. The Creeks project will adversely affect habitat for the California spotted owl, American
10 marten, and Pacific fisher. According to the ROD, the project will log approximately 28 percent of
11 the existing habitat for the spotted owl and marten in the project area, and will reduce suitable
12 habitat for these species by approximately 15 percent. However, these figures underestimate the
13 actual amount of habitat degradation that will occur if the Creeks project is implemented. In
14 addition, the Creeks project will log and degrade areas that provide habitat connectivity for the
15 marten and fisher. Experts who reviewed the Creeks EIS have concluded that the project is likely to
16 threaten the viability and distribution of the owl and marten in the planning area and to degrade
17 habitat connectivity for these species and the Pacific fisher.

18 **PROCEDURAL BACKGROUND**

19 21. The Forest Service first initiated the scoping process for the Creeks project in June 2004.
20 Plaintiffs submitted timely written comments in response to the June 2004 scoping notice, describing
21 the kind of information, analysis, and alternatives that should be included in the environmental
22 analysis for the project.

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24 22. In February 2005, the Forest Service initiated a second scoping process and announced
25 that an EIS would be prepared in connection with the project. Plaintiffs submitted timely written
26 comments in response to the second scoping period. In particular, plaintiffs urged that the EIS
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1 consider all reasonable alternatives, including an alternative that would protect trees 20” diameter
2 and greater and maintain canopy cover at 50 percent or greater.

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4 23. In May 2005, the Forest Service issued a draft EIS (DEIS) for the Creeks project,
5 together with a proposed action. Plaintiffs filed timely written comments on the draft EIS, together
6 with critiques from experts in the fields of wildlife biology and fire ecology. In their comments,
7 plaintiffs argued that the Forest Service had failed to disclose important information about
8 environmental impacts, failed to analyze all significant issues, and failed to consider reasonable
9 alternatives. Plaintiffs’ experts concluded that the Creeks project would adversely affect the spotted
10 owl, marten, and fisher, threatening the viability and distribution of these species.

11 24. In September 2005, the Forest Service issued a record of decision and final EIS (FEIS)
12 approving the Creeks project. The selected alternative, Alternative 14, was described in the FEIS as
13 being very similar in most respects to the proposed action in the DEIS. Plaintiffs filed timely
14 administrative appeals of the ROD and FEIS, again supported by critiques from experts in the fields
15 of wildlife biology and fire ecology. By letter dated December 19, 2005, the Appeal Deciding
16 Officer denied the appeals and affirmed the Forest Supervisor’s decision to approve the Creeks
17 project. This decision constitutes the final administrative determination of the Department of
18 Agriculture.

19 25. On September 27, 2005, the Forest Service announced that it would accept bids for four
20 timber sales implementing the Creeks project: Castle, Ursa, Yellow, and Panhandle. By letters
21 dated January 18, 2006, the Forest Service notified Sierra Pacific Industries that it had been awarded
22 three of the sales -- Castle, Ursa, and Yellow. As of February 3, 2006, the fourth sale – Panhandle –
23 had yet to be awarded. The contracts authorize Sierra Pacific Industries to commence logging
24 activity after the Forest Service’s written approval of an operating plan for each sale.
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1 **FIRST CLAIM FOR RELIEF – Failure to Consider Reasonable Alternatives**
2 **as Required by NEPA**

3 26. Plaintiffs hereby re-allege, as if fully set forth herein, each and every allegation
4 contained in the preceding paragraphs.

5 27. NEPA and the regulations of the Council on Environmental Quality (CEQ) require that
6 EISs rigorously explore and objectively evaluate all reasonable alternatives to the proposed action.
7 42 U.S.C. § 4322(C)(iii); 40 C.F.R. § 1502.14(a). The CEQ regulations consider the discussion of
8 alternatives to be “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14.

9 28. Plaintiffs, in their scoping comments on the Creeks project, urged the Forest Service to
10 consider a full range of alternatives in the EIS, including an alternative modeled upon the 2001
11 Framework. The Creeks DEIS considered in detail only two alternatives, the proposed action and no
12 action. Commenters on the DEIS, including plaintiffs, urged the Forest Service to analyze a broader
13 range of reasonable alternatives, including alternatives involving less intensive logging, such as
14 reduced logging diameter limits and higher canopy cover retention standards. Plaintiffs submitted
15 evidence indicating that such alternatives would meet the project’s purpose and need while having
16 fewer adverse impacts on old forest wildlife.

17 29. The final EIS included one additional alternative, Alternative 14, which is described in
18 the EIS as being “very similar” to the proposed action in the draft EIS in virtually all respects. The
19 FEIS did not explore in detail any alternatives with lower logging diameter limits or higher canopy
20 cover retention standards, and did not consider in detail an alternative based upon the 2001
21 Framework. Both of these options are reasonable alternatives as that term is used in NEPA and the
22 CEQ regulations.
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24 30. The Forest Service’s failure to consider all reasonable alternatives in the EIS is contrary
25 to NEPA and the CEQ regulations, and is therefore arbitrary, capricious, contrary to law, and
26 without observance of procedure required by law, contrary to the Administrative Procedure Act, 5
27 U.S.C. § 706(2).
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1 **SECOND CLAIM FOR RELIEF – Failure to Take a Hard Look at the Project’s**
2 **Environmental Impacts as Required by NEPA**

3 31. Plaintiffs hereby re-allege, as if fully set forth herein, each and every allegation
4 contained in the preceding paragraphs.

5 32. NEPA and the CEQ regulations require that federal agencies carefully consider every
6 significant aspect of a project’s environmental impacts. 42 U.S.C. § 4332(c); 40 C.F.R. § 1502.16.
7 As interpreted by the courts, this duty requires federal agencies to take a hard look at a project’s
8 environmental impacts, based upon the best available scientific information. NEPA and the CEQ
9 regulations also require that EISs consider cumulative impacts, which are defined as “the impact on
10 the environment which results from the incremental impact of the action when added to other past,
11 present, and reasonably foreseeable future actions regardless of what agency (Federal or non-
12 Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7.

13 33. The Creeks FEIS fails to take a hard look at the project’s impacts on the California
14 spotted owl and its habitat. For example, the FEIS fails adequately to acknowledge the owl’s
15 imperiled status in the project area. In addition, the FEIS underestimates the amount of owl habitat
16 that will be rendered unsuitable by the project, understates the number of owl territories that will be
17 adversely affected, and fails adequately to analyze how this degradation of habitat and territories will
18 affect the owl’s viability and distribution in the project area.

19 34. The Creeks FEIS fails to take a hard look at the project’s impacts on the American
20 marten and its habitat. For example, the FEIS fails to recognize the imperiled status of the marten in
21 the northern Sierra Nevada and fails to disclose the ecological significance of the project area for the
22 marten. The FEIS also underestimates the project’s adverse impacts on marten habitat, fails
23 adequately to disclose negative effects to habitat connectivity, and fails adequately to assess the
24 project’s impacts on the marten’s viability and distribution in the project area.

25 35. The Creeks FEIS fails to take a hard look at the project’s impacts on the Pacific fisher
26 and its habitat. The FEIS fails to include any analysis of the project’s impacts to fisher habitat based
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1 on the assertion that the project area does not provide potential habitat for the fisher. This assertion
2 is contrary to the best available scientific information and is therefore arbitrary, capricious, and
3 contrary to law.

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5 36. The Creeks FEIS fails to take a hard look at the project's impacts on the pileated
6 woodpecker, a species closely associated with large standing live and dead trees (snags). The FEIS
7 concludes that the project will have "no effect" on the pileated woodpecker and its habitat. This
8 conclusion is contrary to the best available scientific information and is inconsistent with the Forest
9 Service's previous finding that implementation of projects such as Creeks will adversely affect the
10 pileated woodpecker and its habitat.

11 37. The Creeks FEIS fails to take a hard look at whether the intensity of proposed logging is
12 necessary to achieve the project's purpose and need. Plaintiffs and other commenters submitted
13 substantial evidence demonstrating that the Forest Service can achieve its fuels reduction objectives
14 utilizing less intensive logging, i.e., lower logging diameter limits and higher canopy cover reduction
15 levels, which will have fewer adverse impacts on old forest wildlife. The FEIS failed to consider
16 this information carefully or to analyze the extent to which the project's purpose and need can be
17 met with less intensive logging and fewer adverse environmental impacts.

18 38. With respect to all of the foregoing issues, the Forest Service failed adequately to
19 consider the cumulative impacts of the Creeks project together with other past, present, and
20 reasonably foreseeable projects in the area, including but not limited to logging activities on private
21 lands.

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23 39. The failure of the Creeks FEIS to take a hard look at these and other significant
24 environmental issues violates NEPA and the CEQ regulations, and is therefore arbitrary, capricious,
25 contrary to law, and without observance of procedure required by law, contrary to the Administrative
26 Procedure Act, 5 U.S.C. § 706(2).

1 **THIRD CLAIM FOR RELIEF – Failure to Ensure the Viability and Distribution of Wildlife**
2 **that Inhabit Old Forests as Required by NFMA**

3 40. Plaintiffs hereby re-allege, as if fully set forth herein, each and every allegation contained
4 in the preceding paragraphs.

5 41. The National Forest Management Act requires that the Forest Service “provide for
6 diversity of plant and animal communities” in the national forests. 16 U.S.C. § 1604(g)(3)(B). The
7 regulations that applied when the Forest Service most recently amended the Lassen National Forest
8 plan required the Forest Service to “maintain viable populations” of wildlife in the planning area. 36
9 C.F.R. § 219.19 (1999). “For planning purposes, a viable population shall be regarded as one which
10 has the estimated numbers and distribution of reproductive individuals to insure its continued
11 existence is well distributed in the planning area.” *Id.*

12 42. The Land and Resource Management Plan (LRMP) for the Lassen National Forest,
13 which applies to the Creeks project, requires that the Forest Service “maintain ... viable populations
14 of plants and wildlife” (p. 4-30) and “[m]anage habitat for Sensitive wildlife species to insure that
15 these species do not become Threatened or Endangered due to Forest Service actions” (p. 4-6). The
16 Record of Decision for the Herger-Feinstein Quincy Library Group Forest Recovery Act, which
17 amended the Lassen management plan and also applies to the Creeks project, requires that “habitat
18 connectivity ... be maintained to allow movement of old forest ... dependent species between areas
19 of suitable habitat.” The Record of Decision for the 2004 Sierra Nevada Forest Plan Amendment,
20 which also amended the Lassen plan and applies to the Creeks project, includes as one of its key
21 elements “sustaining viable populations of at-risk species associated with old forest ecosystems well-
22 distributed across Sierra Nevada national forests,” and specifically requires that projects
23 implementing the plan “minimize old forest habitat fragmentation.” NFMA requires that individual
24 projects, such as the Creeks project, “be consistent with the land management plans.” 16 U.S.C. §
25 1604(i).
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1 43. The Creeks project threatens the viability, distribution, and habitat connectivity of the
2 California spotted owl, American marten, and Pacific fisher in the planning area, exacerbates
3 existing habitat fragmentation, and contributes to the need for federal listing of these sensitive
4 species under the Endangered Species Act. The Forest Service’s findings to the contrary are
5 inconsistent with the best available scientific information, unsupported by substantial evidence, and
6 not based on adequate disclosure and analysis of the project’s likely impacts. Therefore, the Creeks
7 project fails to comply with NFMA, applicable regulations, and the Lassen forest plan as amended,
8 and is arbitrary, capricious, contrary to law, and without observance of procedure required by law,
9 contrary to the Administrative Procedure Act, 5 U.S.C. § 706(2).
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11 **FOURTH CLAIM FOR RELIEF – Failure to Monitor Wildlife Populations and Trends as**
12 **Required by NFMA**

13 44. Plaintiffs hereby re-allege, as if fully set forth herein, each and every allegation
14 contained in the preceding paragraphs.

15 45. The Lassen National Forest LRMP, as amended beginning in 2001, requires the Forest
16 Service to collect annual monitoring and population trend data for numerous management indicator
17 species (MIS) and species at risk (SAR), including but not limited to the pileated woodpecker, the
18 black bear, and other species. NFMA requires that individual projects, such as the Creeks project,
19 “be consistent with the land management plans.” 16 U.S.C. § 1604(i). Therefore, before approving
20 individual projects such as Creeks, the Forest Service is required to obtain annual monitoring and
21 population trend data for MIS and SAR that occur in the project area.
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23 46. The Forest Service has failed to obtain annual monitoring and population trend data for
24 numerous MIS and SAR in the Creeks project area, including but not limited to the pileated
25 woodpecker and the black bear. Therefore, the Creeks project fails to comply with NFMA and the
26 Lassen forest plan as amended, and is arbitrary, capricious, contrary to law, and without observance
27 of procedure required by law, contrary to the Administrative Procedure Act, 5 U.S.C. § 706(2).
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2 **PRAYER FOR RELIEF**

3 For the foregoing reasons, plaintiffs respectfully request that the Court:

4 A. Declare that the Forest Service’s failure to consider reasonable alternatives in the Creeks
5 FEIS violates the National Environmental Policy Act and the regulations of the Council on
6 Environmental Quality;

7 B. Declare that the Forest Service’s failure to take a hard look at significant environmental
8 issues in the Creeks FEIS violates the National Environmental Policy Act and the regulations of the
9 Council on Environmental Quality;

10 C. Declare that Forest Service’s finding that the Creeks project would ensure the viability
11 and distribution of species associated with old forests is arbitrary, capricious, and contrary to the
12 National Forest Management Act, applicable regulations, and the Lassen forest plan;

13 D. Declare the Forest Service’s failure to obtain annual monitoring and population trend data
14 for wildlife in the Creeks project area is arbitrary, capricious, and contrary to the National Forest
15 Management Act and the Lassen forest plan;

16 E. Enjoin defendants from further implementing the Creeks project and vacate the record of
17 decision approving the project;

18 F. Award plaintiffs their costs of litigation, including reasonable attorneys’ fees and costs,
19 pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

20 G. Grant plaintiffs such additional relief as the Court may deem just and proper.
21

22 DATED: February 17, 2006

23 Respectfully submitted:

24 /s/David B. Edelson

25 _____
26 David B. Edelson
27 Michael W. Graf
28 Attorneys for Plaintiffs