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9
10 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
11 SACRAMENTO DIVISION

12
13 SIERRA NEVADA FOREST PROTECTION
14 CAMPAIGN,

15 Plaintiff,

16 v.

17 BERNARD WEINGARDT, in his official capacity
as Deputy Regional Forester; UNITED STATES
18 FOREST SERVICE; and UNITED STATES
DEPARTMENT OF AGRICULTURE,

19 Defendants.
20

Case No. Civ. S-04-2727 DFL DAD

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1 INTRODUCTION

2 1. This is a civil action for declaratory and injunctive relief. Plaintiff challenges the
3 decision of defendant Bernard Weingardt, Deputy Regional Forester, to dismiss without review
4 plaintiff’s administrative appeal of the North 49 logging project. Plaintiff seeks a declaration
5 that the decision to dismiss the appeal is contrary to the Appeals Reform Act, a declaration that
6 the regulations pursuant to which the appeal was dismissed are contrary to the Appeals Reform
7 Act, and an injunction prohibiting defendants from implementing the North 49 project until
8 plaintiff’s appeal is decided on its merits as required by law.

9 JURISDICTION AND VENUE

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

12 3. There exists now between the parties an actual, justiciable controversy. Plaintiff has
13 attempted to exhaust its administrative remedies and the decision of defendant Weingardt
14 dismissing plaintiff’s appeal constitutes the final administrative determination of the Department
15 of Agriculture.

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

19 5. Filing in the Sacramento Division of this judicial district is proper under Local Rule 3-
20 120 because the land that is the subject of this dispute is located in Lassen County.

21 PARTIES

22 6. SIERRA NEVADA FOREST PROTECTION CAMPAIGN (hereinafter referred to as
23 “CAMPAIGN”) is a Sacramento-based coalition of over eighty local, regional and national
24 environmental organizations dedicated to protecting and restoring the Sierra Nevada’s national
25 forests. The Campaign was formed in 1996 to coordinate and focus the efforts of its member

1 groups and maximize their effectiveness. The Campaign works to protect and restore the ancient
2 forests, wildlands, wildlife and watersheds of the Sierra Nevada through scientific and legal
3 advocacy, public education and outreach, and grassroots forest protection efforts. Among other
4 things, the Campaign has sought to achieve greater protections for the California spotted owl,
5 Pacific fisher, American marten and other old forest dependent species.

6 7. The Campaign and its member organizations have individual members who live and
7 work near and visit the Lassen National Forest, including the North 49 project area. They use
8 these national forest lands for a variety of purposes, such as hiking, backpacking, skiing,
9 photography, scientific study, wildlife observation, hunting and fishing, and intend to continue to
10 do so on an ongoing basis in the future. Plaintiff's members derive recreational, spiritual,
11 professional, aesthetic, educational and other benefits and enjoyment from these activities.

12 8. The North 49 project, if implemented as currently planned, will adversely affect
13 plaintiff's members' use and enjoyment of the project area by logging medium and large trees,
14 reducing forest canopy cover, and related activities that will reduce the area's value as habitat for
15 species associated with older forests, such as the California spotted owl and American marten.

16 9. The Campaign and its member organizations have a long history of involvement in
17 planning and decision making for the Lassen National Forest, including specifically the North 49
18 project area. The Campaign and its member organizations filed written comments on the North
19 49 proposal, met with and corresponded with Forest Service employees regarding the project,
20 and filed an administrative appeal of the project. The decision of defendant Weingardt to
21 dismiss plaintiff's appeal without review directly and adversely affects plaintiff's interests.

22 10. The Campaign and its members have been, are being, and will continue to be
23 adversely affected and irreparably injured by the decision challenged in this case. These injuries
24 are actual and concrete and would be redressed by the relief sought herein. Plaintiff has no
25 adequate remedy at law.

1 11. The defendants in this action are:

2 a. BERNARD WEINGARDT is the Deputy Regional Forester for the Pacific Southwest
3 Region of the United States Forest Service, and was the Appeal Deciding Officer who issued the
4 ruling dismissing plaintiff's administrative appeal of the North 49 project. He is sued in his
5 official capacity.

6 b. UNITED STATES FOREST SERVICE is an administrative agency under the
7 Department of Agriculture responsible for managing national forest lands, including lands within
8 the Lassen National Forest that are included within the North 49 project.

9 c. UNITED STATES DEPARTMENT OF AGRICULTURE is an administrative agency
10 legally responsible for administering national forest lands.

11 **FACTUAL BACKGROUND**

12 12. The North 49 project is located within the Hat Creek Ranger District of the Lassen
13 National Forest in the northern Sierra Nevada mountains of California. As described in the
14 Decision Notice signed by the Acting Forest Supervisor, the project involves 12,165 acres of
15 "defensible fuel profile zone" (DFPZ) logging, 1,186 acres of group selection logging, nearly
16 2,000 acres of additional forest "thinning," and construction of approximately 1.4 miles of new
17 roads.

18 13. On February 23, 2004, plaintiff Sierra Nevada Forest Protection Campaign wrote a
19 letter to the District Ranger of the Hat Creek Ranger District expressing the Campaign's "interest
20 in the projects and activities of the Hat Creek Ranger District," including specifically the North
21 49 project, and requesting copies of various planning documents relating to these projects.

22 14. On March 16, 2004, the Hat Creek District Ranger mailed to interested parties,
23 including plaintiff, a document entitled "North 49 Project, Proposed Action/Purpose and Need."
24 The proposed action was accompanied by a cover letter briefly describing the project, stating that
25

1 “input on this proposed action is welcome,” and requesting written comments by no later than
2 March 30, 2004.

3 15. On March 30, 2004, plaintiff Sierra Nevada Forest Protection Campaign submitted
4 written comments on the proposed action. These comments expressed concerns regarding the
5 adverse environmental impacts of logging, particularly on species that inhabit older forests.

6 16. On March 28, 2004, Patricia Puterbaugh, on behalf of the Lassen Forest Preservation
7 Group (a member organization of the Campaign) and the Yahi Group of the Sierra Club,
8 submitted written comments in response to the proposed action. The comments raised a number
9 of concerns about the project and its environmental impacts, including the impacts of proposed
10 logging on old growth forests and associated wildlife, such as the California spotted owl and
11 American marten. The comments also raised concerns about the inadequacy of environmental
12 analysis, including failure to consider reasonable alternatives.

13 17. On May 11, 2004, the Hat Creek District Ranger sent a letter to the Sierra Nevada
14 Forest Protection Campaign and to Ms. Puterbaugh acknowledging that the Forest Service
15 received the written comments and thanking the groups for their input. The letter was
16 accompanied by a “clarified” proposed action. The “clarified” proposed action was very similar
17 to the proposed action that accompanied the March 16 letter. The cover letter invited additional
18 comments on the clarified proposal to be submitted within 30 days.

19 18. The Campaign did not submit additional written comments on the “clarified”
20 proposed action because the “clarified” proposal was very similar to the earlier proposed action,
21 in response to which the Campaign had already filed written comments. Because the proposed
22 action had not changed significantly, the Campaign’s earlier comments remained relevant and
23 applicable to the “clarified” proposed action.

24 19. In a letter to the Sierra Nevada Forest Protection Campaign dated August 20, 2004,
25 the Hat Creek District Ranger thanked the Campaign for its input and interest in the North 49

1 project, stated that the Campaign’s comments had been considered, and indicated that several
2 changes were made in the proposed action in response to public comments.

3 20. On August 20, 2004, the Acting Forest Supervisor for the Lassen National Forest
4 signed a Decision Notice and Finding of No Significant Impact approving the North 49 project.
5 The Acting Forest Supervisor stated that he had considered the comments submitted during both
6 earlier comment periods. The Decision Notice stated that it was subject to appeal pursuant to 36
7 CFR § 215 and that appeals must be filed with the Appeal Deciding Officer in the Regional
8 Forester’s office within 45 days of the publication of the legal notice in the Lassen County
9 Times. The public notice appeared on August 20, 2004, and appeals were therefore due by
10 October 4, 2004.

11 21. On October 4, 2004, the Campaign filed a timely administrative appeal of the North
12 49 Decision Notice. In the Notice of Appeal and Statement of Reasons, the Campaign argued
13 that the North 49 would have significant, adverse environmental impacts, particularly to old
14 forests and associated wildlife, and that implementing the project would be contrary to the
15 National Forest Management Act and the National Environmental Policy Act. The appeal was
16 supported by declarations from expert wildlife biologists. Dr. Tom Kucera, in his declaration,
17 concluded that implementing the project “would threaten the marten’s distribution and viability
18 in the northern Sierra Nevada, potentially leading to local extirpation.” Monica Bond, a spotted
19 owl biologist, concluded that the project “is likely to threaten the distribution and viability of the
20 California within the project area and beyond, contributing to the present trend towards federal
21 listing.”

22 22. In a letter dated October 25, 2004, defendant Bernard Weingardt, the Appeal
23 Deciding Officer, dismissed plaintiff’s appeal without review. While acknowledging that the
24 appeal was timely filed, Mr. Weingardt found that the Campaign had failed to file comments
25 during the 30-day comment period on the clarified proposed action. Therefore, Mr. Weingardt

1 dismissed the appeal without review, citing 36 CFR § 215.16(a)(6), stating that “this constitutes
2 the final administrative determination of the Department of Agriculture.”

3 23. On December 1, 2004, plaintiff’s attorney sent a letter to Mr. Weingardt requesting
4 reconsideration of the appeal dismissal on the grounds that the Campaign and other appellants
5 had filed comments on the project and had expressed their interest in the project, and that
6 dismissal of the appeal was therefore inconsistent with the Appeals Reform Act.

7 24. In a letter dated December 8, 2004, defendant Weingardt denied plaintiff’s request
8 for reconsideration of the appeal dismissal and affirmed the dismissal of the appeal.

9 25. On December 6, 2004, the Lassen National Forest held an auction and opened bids
10 for two timber sales implementing the North 49 project, the Panner and North 49 timber sales.
11 As of December 17, 2004, the timber sales had not yet been awarded. However, there is no legal
12 obstacle to the award of the sales at any time.

13 LEGAL BACKGROUND

14 26. The National Forest Management Act (NFMA), 16 U.S.C. § 1604, directs the
15 Secretary of Agriculture to develop land and resource management plans for administrative units
16 of the National Forest System, such as the Lassen National Forest. NFMA further directs that
17 actions implementing the plans, such as timber sale contracts, shall be consistent with the plans.
18 16 U.S.C. § 1604(i).

19 27. Beginning with the first regulations implementing the NFMA, the Forest Service has
20 recognized the right of interested parties to administratively appeal decisions implementing land
21 and resource management plans.

22 28. In 1992, the Forest Service undertook a review of the administrative appeal
23 procedures, which led to the publication of a proposed rule that would have prohibited appeals of
24 projects, such as the North 49 project, accompanied by environmental assessments (EAs).
25 However, before a final rule was published, Congress enacted section 322 of the Department of

1 the Interior and Related Agencies Appropriation Act of 1993, Pub. L. 102-381, 106 Stat. 1419
2 (1992)(hereinafter cited as “Appeals Reform Act”).

3 29. The Appeals Reform Act required the Secretary of Agriculture to establish a notice
4 and comment and administrative appeal process for actions implementing land and resource
5 management plans. The Act established a “right to appeal” such projects and stated that “a
6 person who was involved in the public comment process ... through submission of written or
7 oral comments or by otherwise notifying the Forest Service of their interest in the proposed
8 action may file an appeal.” Appeals Reform Act, § 322 (c)(emphasis added).

9 30. In 1993, the Forest Service issued final rules to implement the Appeals Reform Act
10 with respect to notice and comment and appeal of projects implementing land and resource
11 management plans. The rules provided that any person who “provided comment or otherwise
12 expressed interest in a particular proposed action by the close of the comment period” could file
13 an administrative appeal. 36 CFR § 215.11(a)(2)(1994)(emphasis added). In a related provision,
14 the rules provided that appeals shall be dismissed without review if “the appellant did not
15 express an interest in the specific proposal at any time prior to the close of the comment period.”
16 36 CFR § 215.15(a)(5)(1994)(emphasis added).

17 31. In adopting the 1993 regulations, the Forest Service considered and rejected a
18 proposal that the right to appeal be limited to individuals who submitted written comments
19 during the comment period. The Forest Service stated as follows: “Section 322(c) of the
20 [Appeals Reform] Act makes clear that a person who has submitted written or oral comments or
21 otherwise notified the Forest Service of an interest in the proposed action during the public
22 comment process may appeal a decision. Therefore, it is not in keeping with the Act to restrict
23 the right of appeal only to those who have submitted written comments.” 58 Fed. Reg. 58907
24 (November 4, 1993)(emphasis added).
25

1 accordance with law, and without observance of procedure required by law, contrary to the
2 Administrative Procedure Act, 5 U.S.C. § 706(2).

3 REQUEST FOR RELIEF

4 For the foregoing reasons, plaintiff respectfully requests that the Court:

5 A. Declare that the decision of defendant Weingardt and the U.S. Forest Service to
6 dismiss plaintiff's administrative appeal of the North 49 project is contrary to law;

7 B. Declare that 36 CFR §§ 215.13(a) and 215.16(a)(6) are contrary to the Appeals
8 Reform Act;

9 C. Enjoin defendants from further implementing the North 49 project, including but not
10 limited to enjoining implementation of the North 49 and Panner timber sales, until and unless
11 defendant U.S. Forest Service decides plaintiff's administrative appeal on its merits as required
12 by law;

13 D. Award plaintiff its costs of litigation, including reasonable attorneys' fees and costs,
14 pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

15 E. Grant plaintiff such additional relief as the Court may deem just and proper.

16 Respectfully submitted:

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18 DATED: December 28, 2004

19 David B. Edelson
20 Attorney for Plaintiff
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