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15 SIERRA FOREST LEGACY, SIERRA CLUB,)
16 EARTH ISLAND INSTITUTE, and)
17 CALIFORNIA NATIVE PLANT SOCIETY, non-)
18 profit organizations,)
19 Plaintiffs,)
20 v.)
21 BERNARD WEINGARDT, in his official)
22 capacity as Regional Forester, Region 5, United)
23 States Forest Service, EDWARD C. COLE, in his)
24 official capacity as Forest Supervisor, Sierra)
25 National Forest, United States Forest Service,)
26 ABIGAIL R. KIMBELL, in her official capacity)
27 as Chief of the United States Forest Service, and)
28 UNITED STATES FOREST SERVICE, an)
29 agency of the United States Department of)
30 Agriculture,)
31 Defendants.)

Case No:

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

(Administrative Procedure Act case)

1 **INTRODUCTION**

2 1. Plaintiffs bring this action to challenge the United States Forest Service’s approval of
3 the Kings River Project (“Project”), a massive logging plan in the heart of critical habitat for the
4 imperiled Pacific fisher and other sensitive wildlife species that inhabit the old forests of the
5 southern Sierra Nevada. The Forest Service approved the Kings River Project despite widespread
6 opposition from leading scientists and wildlife biologists concerned about the Project’s significant
7 adverse impacts on the dwindling fisher population. The aggressive logging promoted by the agency
8 is contrary to sound science and does not provide a management approach that will actually achieve
9 the Project’s purported goals of conducting meaningful research or restoring a healthy forest
10 ecosystem.

11 2. Plaintiffs allege that in approving the Kings River Project, defendants Bernard
12 Weingardt, *et al.* (“defendants” or “Forest Service”) violated the National Environmental Policy Act
13 (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §
14 706, by failing to provide adequate information or analysis regarding the Project’s likely
15 environmental impacts, failing to take a hard look at or consider a reasonable range of alternatives,
16 and failing to respond adequately to public comments and scientific information. Plaintiffs also
17 contend that the Kings River Project violates the National Forest Management Act (“NFMA”), 16
18 U.S.C. § 1604, and the APA by failing to insure the viability and distribution of imperiled old forest
19 species such as the Pacific fisher, and failing to gather and disclose legally required monitoring data
20 for numerous at-risk species. Plaintiffs seek an order vacating and remanding the Forest Service’s
21 approval of the Kings River Project to remedy the violations of NEPA, NFMA, and the APA, and
22 enjoining the Forest Service from implementing the Project.

23 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

24 3. This Court has jurisdiction over this action by virtue of 28 U.S.C. § 1331 (action
25 arising under the laws of the United States) and 5 U.S.C. § 702 (Administrative Procedure Act), and
26 may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02 (Declaratory
27 Judgment Act). Plaintiffs have exhausted all administrative remedies available to them pursuant to
28 36 C.F.R. Part 215.

1 the protection and restoration of the quality of the natural and human environment and to use all
2 lawful means to carry out those objectives. For many years the Sierra Club and its members have
3 advocated for the protection of forest ecosystems throughout California. These advocacy efforts
4 have included forest mapping and identification of remaining ancient forest areas, lobbying for and
5 achieving funding for numerous forest conservation efforts, and urging protection for imperiled
6 forest species, including the Pacific fisher and California spotted owl. Since the late 1980s, the
7 Sierra Club has actively tracked and participated in major policy decisions and research initiatives
8 relating to Sierra Nevada national forest management and species conservation, including the
9 California Spotted Owl Sierran Province Interim Guidelines of 1993, the Sierra Nevada Ecosystem
10 Project of 1996, the 2001 Framework, and the 2004 Framework. The Sierra Club participated in the
11 planning process for the Kings River Project, commented on the draft and final EISs, and
12 administratively appealed the Project.

13 8. Plaintiff Earth Island Institute (“EII”) is a nonprofit corporation organized under
14 California law and headquartered in San Francisco, California. EII’s mission is to develop and
15 support projects that counteract threats to the biological and cultural diversity that sustains the
16 environment. Through education and activism, these projects promote the conservation,
17 preservation, and restoration of the Earth. One of these projects is the John Muir Project, whose
18 mission is to protect all federal public forest lands from commercial exploitation. EII is a
19 membership organization with over 15,000 members in the United States, over 3,000 of whom use
20 and enjoy the national forests of California for recreational, educational, aesthetic, spiritual, and
21 other purposes. EII through its John Muir Project has a longstanding interest in the protection of
22 national forests, and accomplishes this objective by ensuring that the Forest Service relies upon and
23 addresses all scientific evidence in its decision-making process and that its decisions comply with all
24 federal environmental laws. EII’s John Muir Project and EII members actively participate in
25 governmental decision-making processes with respect to national forest lands in California and rely
26 on information provided through NEPA to increase the effectiveness of their participation. EII’s
27 John Muir Project actively participated in the NEPA and NFMA processes associated with the
28

1 development of the Kings River Project, including submitting comments on the draft EIS and
2 administratively appealing the decision.

3 9. Plaintiff California Native Plant Society (“CNPS”) is a nonprofit organization
4 organized under California law with nearly 10,000 members, both professional botanists and
5 laypersons, dedicated to the preservation of California’s rich native botanical heritage. The mission
6 of the California Native Plant Society is to increase the understanding and appreciation of
7 California’s native plants and to preserve them in their natural habitat through scientific activities,
8 education, and conservation. CNPS members work closely with Forest Service personnel and other
9 State and Federal agencies to manage and conserve botanical resources. CNPS is particularly
10 concerned with the conservation of California’s rare and endemic plant species and threatened plant
11 communities. CNPS participated in the planning process for the Kings River Project, commented on
12 the draft EIS, and administratively appealed the Project.

13 10. The plaintiff organizations described above each have members who live or work in
14 communities located near or adjacent to the national forests in the Sierra Nevada, and specifically
15 near the site of the Kings River Project in Sierra National Forest. Plaintiffs’ members use and enjoy
16 areas in and around the Kings River Project for a variety of purposes including, but not limited to,
17 hiking, backpacking, photography, botanizing, hunting and fishing, scientific study, and wildlife
18 observation, including observation of rare, imperiled, and sensitive wildlife species. They intend to
19 continue to do so on an ongoing basis in the future. Plaintiffs’ members derive recreational,
20 scientific, spiritual, professional, aesthetic, educational, and other benefits and enjoyment from these
21 activities.

22 11. Defendants’ approval of the Kings River Project in violation of NEPA, NFMA, and
23 the APA as alleged below has harmed and injured, and is continuing to harm and injure, the interests
24 of plaintiffs and their members by causing or threatening irreversible adverse effects to the Kings
25 River Project area and to the imperiled wildlife and other objects of interest in Sierra National
26 Forest. Defendants’ actions deprive plaintiffs and their members of the recreational, scientific,
27 spiritual, professional, aesthetic, educational, and other benefits they presently derive from the Kings
28 River Project area. Additionally, defendants’ actions deny plaintiffs’ members their right to have the

1 laws of the land implemented and enforced, and the satisfaction and peace of mind associated with
2 witnessing the implementation and enforcement of this nation's environmental protection laws.

3 12. Consequently, plaintiffs and their members have been, are being, and will continue to
4 be adversely affected and irreparably injured by defendants' approval of the Kings River Project.
5 These injuries are actual and concrete and would be redressed by the relief sought herein. Plaintiffs
6 have no adequate remedy at law.

7 13. Defendant Bernard Weingardt is the Regional Forester for the Forest Service's
8 Pacific Southwest Region, which encompasses the Sierra National Forest, and in that capacity has
9 the responsibility to ensure that the Forest Service acts in accordance with applicable laws and
10 regulations. Mr. Weingardt's office denied the plaintiffs' administrative appeals of the Record of
11 Decision ("ROD") approving the Kings River Project and its associated Final Environmental Impact
12 Statement ("FEIS"). He is sued in his official capacity.

13 14. Defendant Edward Cole is the Forest Supervisor for the Sierra National Forest and
14 was the official who initially approved the ROD and FEIS for the Kings River Project. In his
15 capacity as Forest Supervisor, he has the responsibility to ensure that the Forest Service acts in
16 accordance with applicable laws and regulations. He is sued in his official capacity.

17 15. Defendant Abigail R. Kimbell is the Chief of the Forest Service. The Chief is the
18 highest ranking officer in the Forest Service. The Chief has the responsibility to ensure that the
19 Forest Service acts in accordance with applicable laws and regulations. She is sued in her official
20 capacity.

21 16. Defendant United States Forest Service is an agency of the United States government
22 within the United States Department of Agriculture. The Forest Service has been delegated
23 authority to administer the national forest system of the United States. In that capacity, the Forest
24 Service must comply with NEPA and NFMA in planning and implementing projects which may
25 have a significant effect on the environment.

1 **BACKGROUND OF AGENCY PROCEEDINGS**

2 **Forest Planning in the Sierra Nevada**

3 17. The Sierra Nevada’s eleven national forests contain some of our Nation’s most
4 diverse and spectacular public lands. Covering approximately 11.5 million acres, these forests
5 provide habitat for numerous wildlife species, including the Pacific fisher and California spotted
6 owl. However, more than a century of logging, livestock grazing, road construction, development,
7 and related activities have taken a heavy toll on the Sierra Nevada’s natural resources.

8 18. Beginning in the late 1980s, the Forest Service has developed land and resource
9 management plans (“LRMPs”) for each of the national forests in the Sierra Nevada pursuant to
10 NFMA, 16 U.S.C. § 1604. The Forest Service adopted an LRMP governing the management of
11 Sierra National Forest, including the Kings River Project area, in 1992.

12 19. In 1998, the Forest Service initiated a process to develop new management direction
13 for several urgent problem areas with Sierra Nevada-wide significance, including the decline of old
14 forest ecosystems and associated species.

15 20. On January 12, 2001, the Forest Service signed a Record of Decision adopting the
16 Sierra Nevada Forest Plan Amendment (known as the “2001 Framework”), which amended the
17 forest plans for all eleven national forests in the Sierra Nevada, including Sierra National Forest.
18 The 2001 Framework struck a careful balance between reducing the risk of catastrophic wildfire and
19 protecting old forests and wildlife. In particular, the 2001 Framework emphasized logging of small
20 trees (generally less than 12-20 inches in diameter), which contribute the most to wildfire risk, while
21 protecting medium and large trees (generally greater than 20 inches in diameter), which are most
22 important for wildlife like the Pacific fisher and California spotted owl. To protect species
23 associated with old forests, the plan required that logging projects should maintain at least 50 percent
24 canopy cover in most westside forests, and prohibited the reduction of preexisting canopy cover by
25 more than 20 percent. The 2001 Framework specifically protected habitat zones for old forest
26 dependent species, including the “Southern Sierra Nevada Fisher Conservation Area” and spotted
27 owl “Home Range Core Areas” around owl nest sites.

1 21. On January 21, 2004, the Forest Service adopted a Record of Decision approving
2 substantial revisions to the 2001 Framework (the “2004 Framework”), which again amended the
3 forest plans for the eleven Sierra Nevada national forests, including Sierra National Forest. The
4 2004 Framework substantially weakened the 2001 Framework’s protection of old forests and
5 associated species. Compared to the 2001 Framework, the 2004 Framework allows larger trees to be
6 logged (up to 30 inches in diameter in almost all land allocations) and allows greater reductions in
7 canopy cover (down to 40 percent and less). The 2004 Framework, in nearly all instances,
8 eliminates all of the legally binding standards and guidelines that were included in the 2001
9 Framework to protect the Southern Sierra Nevada Fisher Conservation Area and spotted owl Home
10 Range Core Areas, and allows such areas to be logged pursuant to the less protective guidelines for
11 general forest areas.

12 **The Kings River Project**

13 22. The Kings River Project proposes logging operations, herbicide treatments, and
14 prescribed fire on 131,500 acres in the Dinky Creek and Big Creek watersheds of Sierra National
15 Forest over the next 25 years. Phase I of the Project, which is the initial portion approved by the
16 Forest Service, authorizes the “treatment” of 13,847 acres within eight management units. This
17 phase authorizes the logging of trees up to 30 inches in diameter, including 6,000 acres of uneven-
18 aged logging and 1,865 acres of defensible fuel profile zone (“DFPZ”) logging, and more than 9,000
19 acres of prescribed burning. Approximately 7,600 acres of Phase I are classified as “commercial
20 harvest” and are expected to produce over 23 million board feet of timber. Implementation of Phase
21 I is expected to commence in 2007 and continue over a three-year period.

22 23. Phase II of the Kings River Project is expected to involve similar treatments for 60
23 additional units in the remaining acreage between 2011 and 2033. However, the Forest Service
24 states that specific treatments for these units will depend on monitoring and research results from the
25 eight units in Phase I, and that further site-specific NEPA analysis will be conducted.

26 24. On January 27, 2006, the Forest Service issued a draft EIS for Phase I of the Kings
27 River Project containing two alternatives: the proposed action (Alternative 1) and the no action
28 alternative (Alternative 2). Plaintiffs Sierra Forest Legacy, Sierra Club, Earth Island Institute, and

1 California Native Plant Society submitted comments on the draft EIS for Phase I on or prior to
2 March 28, 2006.

3 25. The Forest Service released its FEIS for Phase I of the Kings River Project in October
4 2006, which contained a new “Reduction of Tree Harvest Size Alternative” (Alternative 3).
5 Plaintiffs Sierra Forest Legacy and Sierra Club submitted supplemental comments on the FEIS on
6 November 20, 2006, and plaintiff Earth Island Institute submitted supplemental comments on
7 November 22, 2006.

8 26. The Forest Supervisor (defendant Cole) signed the Record of Decision for Phase I of
9 the Kings River Project on December 20, 2006, selecting Alternative 3 from the FEIS as the decision
10 to be implemented.

11 27. Plaintiffs Earth Island Institute and California Native Plant Society each
12 administratively appealed the decision to the Regional Forester (defendant Weingardt) on February
13 3, 2007, and plaintiffs Sierra Forest Legacy and Sierra Club filed an administrative appeal on
14 February 5, 2007.

15 28. The Forest Service failed to offer plaintiffs a timely appeal resolution meeting as
16 required by 36 C.F.R. § 215.17(b). Plaintiffs met with the Forest Supervisor (defendant Cole) on
17 March 14, 2007 to make a substantial appeal resolution offer, but plaintiffs’ offer was rejected by the
18 Forest Supervisor on March 16, 2007.

19 29. The Regional Forester (defendant Weingardt), acting through his Deputy, denied all
20 administrative appeals of the Kings River Project on March 20, 2007, and affirmed the Forest
21 Supervisor’s decision to approve the Project. Consequently, no legal obstacle now prevents the
22 Forest Service from advertising and awarding timber sale contracts pursuant to the Kings River
23 Project, and logging can begin as soon as conditions permit.

24 **Old Forest Wildlife and Sensitive Plant Species in the Kings River Project Area**

25 30. Numerous old forest dependent wildlife species occur or potentially occur in the
26 Kings River Project area and will be adversely affected by implementation of the Project. These
27 include several management indicator species, species at risk, Forest Service designated “sensitive”
28 species, and at least two species found to be warranted for listing under the Endangered Species Act.

1 31. The Pacific fisher (*Martes pennanti*) is a forest carnivore that inhabits dense, older
2 forests in the southern Sierra Nevada, including the Kings River Project area, which is only a small
3 portion of its historic range. The fisher is among the most habitat-specific mammals in North
4 America, utilizing large areas of primarily coniferous forests with fairly dense canopies and large
5 trees, snags, and downed logs. Recent research in the southern Sierra confirms that medium and
6 large trees, such as those that will be logged by the Kings River Project, are an important element of
7 high quality fisher habitat, especially in providing for fisher rest sites.

8 32. On April 8, 2004, the U.S. Fish and Wildlife Service (“FWS”) found that the west
9 coast population of the fisher warrants listing under the Endangered Species Act, but deferred listing
10 due to workload constraints (a “warranted but precluded” decision). 69 Fed. Reg. 18,770 (Apr. 8,
11 2004). According to the FWS, “preliminary analyses indicate West Coast fisher populations,
12 particularly in the southern Sierra, may be at significant risk of extinction.” *Id.* at 18,789. The FWS
13 cites logging as one of the primary causes of fisher decline in the Sierra Nevada. *Id.* at 18,778.

14 33. Recent data indicates that the southern Sierra population of the Pacific fisher may
15 number between just 100 to 500 individuals, with as few as 50 female fishers remaining. Given the
16 current low density of fishers in the southern Sierra Nevada, the loss of even a small number of
17 individuals could significantly impact the population.

18 34. In 2006, the Conservation Biology Institute (“CBI”), a non-profit scientific research
19 organization based in Corvallis, Oregon, was commissioned by the Forest Service to conduct a
20 “Southern Sierra Nevada Fisher Assessment,” which involves compiling all available data on fisher
21 populations and habitat in the southern Sierra Nevada, assessing their current status, and predicting
22 how they are likely to respond to various alternative forest management actions, as well as
23 unmanaged events such as wildfires, drought, or bark beetle outbreaks. The assessment is designed
24 to create a scientifically credible set of habitat maps and estimates of fisher population size and
25 distribution in the southern Sierra Nevada based on current conditions, as well as an assessment of
26 how fisher habitat and populations are likely to change in the future under a range of alternative
27 scenarios.

1 35. The Forest Service has decided to move forward with the Kings River Project, which
2 authorizes logging in prime fisher habitat, even though the CBI assessment has not been completed.

3 36. The Kings River Project is located within and encompasses approximately 5% of the
4 Southern Sierra Nevada Fisher Conservation Area, a region designated for protection by the Forest
5 Service in the 2001 Framework. Much of the Kings River Project area is considered to be high
6 quality fisher habitat, and as many as 36 individuals may reside within the Project boundaries.
7 Approximately 13,700 acres in Phase I of the Kings River Project may include portions of 13 fisher
8 home ranges, including home ranges that extend beyond the Phase I project area.

9 37. Implementation of the Kings River Project will adversely affect the fisher population
10 by causing a significant loss of key habitat in the southern Sierra Nevada and threatening the
11 survival of this species.

12 38. The California spotted owl (*Strix occidentalis occidentalis*) is a medium-sized raptor
13 with large dark eyes and mottled brown and white coloring. California spotted owls inhabit the
14 Sierra Nevada mountain range from Shasta County in the northern Sierra Nevada south to Kern
15 County, including the Kings River Project site within Sierra National Forest. The owl is closely
16 associated with the structural attributes of older forests in the Sierra Nevada, including medium and
17 large trees, dense canopy cover, and large snags and down logs. Preferred habitat for the California
18 spotted owl consists of mixed conifer forests dominated by trees larger than 24 inches in diameter
19 and with 70 percent or greater canopy cover for nesting and roosting and 50 percent or greater
20 canopy cover for foraging. The Forest Service has designated the California spotted owl as a
21 “sensitive” species due to its close association with older forests, and the owl population in Sierra
22 National Forest is known to be in decline.

23 39. The Kings River Project will adversely affect the California spotted owl, as Phase I
24 alone is likely to impact more than 9,000 acres of suitable owl habitat, including a significant
25 amount of owl Home Range Core Areas and related nest sites. The proposed logging will result in
26 the loss of important elements of owl habitat, such as the removal of medium and large trees and
27 severe reductions in canopy cover. The FEIS erroneously assumes that areas with trees greater than
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1 12 inches in diameter and 40% canopy cover constitute “suitable” owl habitat, and that there will be
2 no impacts to owls as long as habitat is retained at these levels.

3 40. The Kings River Project area is host to a wide range of sensitive species-at-risk and
4 management indicator species (“MIS”) that require annual monitoring under the Sierra National
5 Forest LRMP and Appendix E of the 2001 Framework (which was retained by the 2004
6 Framework). These include the Swainson’s thrush, a species-at-risk that depends upon dense, closed
7 canopy forest conditions, and the Olive-sided flycatcher, a species-at-risk that depends upon burned
8 forest habitat. The logging activities proposed in the Kings River Project will remove or degrade
9 suitable habitat for the Swainson’s thrush and will create conditions that superficially mimic post-
10 fire habitat, drawing Olive-sided flycatchers into an “ecological trap” where they are unlikely to
11 survive or successfully reproduce. Monitoring for these species in accordance with the Sierra
12 National Forest LRMP and the 2001 and 2004 Frameworks has not occurred.

13 41. The Kings River Project area also includes several rare plant species, including
14 *Carpenteria californica* and *Lupinus citrinus* var. *citrinus*. Monitoring for these species required by
15 the Sierra National Forest LRMP and the 2001 and 2004 Frameworks has not occurred.

16 **STATUTORY AND REGULATORY FRAMEWORK**

17 **The National Environmental Policy Act**

18 42. The National Environmental Policy Act is our “basic national charter for the
19 protection of the environment.” 40 C.F.R. § 1500.1. Congress enacted NEPA “[t]o declare a
20 national policy which will encourage productive and enjoyable harmony between man and his
21 environment; to promote efforts which will prevent or eliminate damage to the environment and
22 biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the
23 ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321.

24 43. To accomplish these purposes, NEPA requires all agencies of the federal government
25 to prepare a “detailed statement” that discusses the environmental impacts of, and reasonable
26 alternatives to, all “major Federal actions significantly affecting the quality of the human
27 environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an environmental
28 impact statement (“EIS”).

1 44. The EIS process is intended “to help public officials make decisions that are based on
2 understanding of environmental consequences, and to take actions that protect, restore, and enhance
3 the environment” and to “insure that environmental information is available to public officials and
4 citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b)-(c). The
5 EIS must “provide full and fair discussion of significant environmental impacts and shall inform
6 decision-makers and the public of the reasonable alternatives which would avoid or minimize
7 adverse impacts or enhance the quality of the human environment.” *Id.* at § 1502.1.

8 **The National Forest Management Act**

9 45. Congress enacted the National Forest Management Act in 1976 to reform the Forest
10 Service’s management of the National Forest System, primarily by requiring greater recognition of
11 non-timber resources, such as wildlife, water, and soils, constraining the use of clearcutting, and
12 requiring greater opportunities for public participation in forest planning.

13 46. NFMA provides for a two-stage approach to land management planning. The Forest
14 Service is first required to develop land and resource management plans for each National Forest.
15 16 U.S.C. § 1604(e). The LRMPs establish basic guidelines and set forth the planning elements that
16 will be employed by the Forest Service in future actions in a particular forest, including use of the
17 land for “outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.” *Id.* at §
18 1604(e)(1).

19 47. Once an LRMP is approved, direct implementation occurs at a second stage where
20 individual, site-specific projects are proposed and assessed. A site-specific project or decision, such
21 as the Kings River Project, must be consistent with the LRMP for the larger area. 16 U.S.C. §
22 1604(i).

23 48. NFMA requires the promulgation of regulations specifying guidelines for LRMPs
24 that address a variety of resource management issues. 16 U.S.C. § 1604(g). In particular, the
25 regulations must include guidelines that ensure LRMPs comply with NEPA, provide for the diversity
26 of plant and animal communities in each National Forest, restrict timber harvesting to avoid
27 irreversible damage to soils, slopes, and watersheds, and limit the use of clearcutting and other even-
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1 aged timber harvest methods (*i.e.*, harvest methods that result in a replacement stand of trees of
2 identical age). *Id.*

3 49. As required by NFMA, 16 U.S.C. § 1604(g), the Forest Service promulgated
4 regulations implementing the planning provisions of NFMA in 1982. 36 C.F.R. Part 219 (1982).
5 The 1982 regulations apply to the Kings River Project since the Sierra National Forest LRMP, as
6 amended by the 2004 Framework, was prepared in accordance with the 1982 regulations.

7 CLAIMS FOR RELIEF

8 FIRST CLAIM FOR RELIEF

9 Violations of NEPA and the APA: 10 Failure to Adequately Analyze Impacts on Imperiled Wildlife and Plant Species, 11 Wildfire Risk, and Soils

11 50. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
12 the preceding paragraphs.

13 51. NEPA requires all agencies of the federal government to prepare a “detailed
14 statement” that discusses the environmental impacts of, and reasonable alternatives to, all “major
15 Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. §
16 4332(2)(C). An EIS must analyze “direct effects,” which are “caused by the action and occur at the
17 same time and place,” as well as “indirect effects which . . . are later in time or farther removed in
18 distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8. An EIS must also consider the
19 cumulative impacts of the proposed federal agency action together with past, present and reasonably
20 foreseeable future actions, including all federal and non-federal activities. *Id.* at § 1508.7.

21 52. An EIS must be clear and supported by evidence that the agency has made the
22 necessary environmental analyses. 40 C.F.R. § 1502.1. NEPA requires that the agency use the best
23 available data and ensure the scientific integrity of an EIS, disclose opposing scientific viewpoints,
24 and follow specified procedures to address gaps in data and scientific uncertainty. *Id.* at §§ 1500.1,
25 1502.9, 1502.22, 1502.24.

26 53. The FEIS for the Kings River Project fails to adequately analyze or take a hard look
27 at the Project’s likely impacts on old forest dependent species and their habitat. For example, the
28 FEIS provides inaccurate or inadequate information on the current status of the Pacific fisher, its

1 habitat in the Kings River Project area, and the significant adverse impacts of logging this habitat.
2 The FEIS fails to consider the role of the Kings River Project in reducing suitable fisher habitat
3 within the Southern Sierra Nevada Fisher Conservation Area. The FEIS also provides an inadequate
4 analysis of the amount and distribution of high quality habitat, home ranges, connective corridors,
5 and other important habitat elements for the fisher that will be adversely affected by the Project.

6 54. The FEIS fails to adequately evaluate impacts to the California spotted owl by
7 inaccurately describing the species' habitat requirements and ignoring impacts from logging near
8 nest sites and in Home Range Core Areas. The FEIS also underestimates the short-term impacts to
9 the owl from habitat loss, and fails to analyze impacts to the owl and its habitat either at the home
10 range or the landscape scale.

11 55. The FEIS fails to adequately analyze the Kings River Project's adverse impacts on
12 sensitive plant species, including *Carpenteria californica* and *Lupinus citrinus* var. *citrinus*, resulting
13 from ground-based logging, the conversion of early successional forests and native plant
14 communities into conifer tree farms, and herbicide treatments intended to favor conifer growth.

15 56. The FEIS claims to evaluate effects of the Project on wildlife and wildlife habitats by
16 estimating the effects on certain management indicator species and species at risk. As set forth
17 below, however, defendants' monitoring and analyses for these species were inadequate and
18 otherwise insufficient to support the conclusions in the FEIS. Thus, the FEIS fails to adequately
19 analyze the Kings River Project's adverse impacts on management indicator species and species at
20 risk.

21 57. The FEIS fails to take a hard look at the impacts of the proposed logging on fire
22 resiliency, relying on a silvicultural modeling approach that does not reflect ecosystem conditions in
23 the Project area. The logging of medium and large diameter trees proposed by the Kings River
24 Project will result in the removal of the most fire-resistant trees and reductions in forest canopy that
25 will create hotter, drier conditions on the ground, allow increased wind speeds, and accelerate the
26 growth of flammable brush and of dense, flammable stands of small conifers. These conditions will
27 not result in a more fire resilient forest but instead will increase the potential for and risk of severe
28 fire in the Kings River Project area.

1 objectively evaluate all reasonable alternatives,” and to “devote substantial treatment to each
2 alternative . . . so that reviewers may evaluate their comparative merits.” *Id.*

3 63. NEPA also requires that an EIS “briefly specify the underlying purpose and need to
4 which the agency is responding in proposing the alternatives including the proposed action.” 40
5 C.F.R. § 1502.13. An agency must not define its project purpose and need so narrowly as to
6 preclude consideration of reasonable alternatives.

7 64. The FEIS for the Kings River Project states that the “underlying purpose of the
8 proposed action is to restore historical pre-1850 forest conditions across a large landscape,” and in
9 doing so, to reduce wildfire risk and preserve wildlife habitat. The FEIS then analyzes in detail only
10 two alternatives other than the No Action Alternative (Alternative 2) to meet this purpose: the
11 Proposed Action (Alternative 1) and the Reduction of Tree Harvest Size Alternative (Alternative 3).

12 65. A number of reasonable alternatives were suggested during the scoping period and
13 public comment period on the draft EIS for the Kings River Project, but were not analyzed in the
14 FEIS. For example, the California Attorney General’s Office, the U.S. Environmental Protection
15 Agency, and plaintiffs all suggested specific alternatives that would achieve the Project’s stated
16 purpose and need of fire risk reduction and yet be more protective of old forest dependant species.
17 These included an alternative that would apply the management direction in the 2001 Framework, as
18 well as an alternative that would involve lower diameter limits and less intensive logging treatments.
19 None of these alternatives was adequately evaluated by defendants in the FEIS.

20 66. In analyzing alternatives, the Forest Service also failed to take a hard look at whether
21 alternatives with less environmental impact would achieve the agency’s stated objectives for fuel
22 reduction, forest health, and restoration of historical pre-1850 forest conditions across a large
23 landscape. For example, while the FEIS shows that the current average density of trees between 20
24 and 30 inches in diameter is already within the “desired range” sought by the Forest Service for the
25 Kings River Project, the agency improperly dismisses alternatives with lower diameter limits as
26 failing to meet the Project’s purpose and need.

27 67. Defendants’ failure in the FEIS to adequately evaluate all reasonable alternatives to
28 the chosen action and its failure to take a hard look at environmentally preferable alternatives

1 violated and is continuing to violate Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and
2 NEPA's implementing regulations, and was arbitrary, capricious, an abuse of discretion, not in
3 accordance with law, and without observance of procedure required by law within the meaning of
4 the APA, 5 U.S.C. § 706(2).

5 **THIRD CLAIM FOR RELIEF**

6 **Violations of NEPA and the APA:** 7 **Failure to Adequately Respond to Comments or Disclose and Respond to Scientific** 8 **Information and Opposition**

8 68. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
9 the preceding paragraphs.

10 69. NEPA requires that the Forest Service respond to comments both individually and
11 collectively in the FEIS. 40 C.F.R. § 1503.4. The Forest Service must respond by: (1) modifying
12 alternatives, including the proposed action; (2) developing and evaluating alternatives not previously
13 considered by the agency; (3) supplementing, improving, or modifying its analysis; or (4) making
14 factual corrections. *Id.* at § 1503.4(a). If the Forest Service feels that no further response is
15 necessary, it must "explain why the comments do not warrant further agency response, citing the
16 sources, authorities, or reasons which support the agency's position." *Id.*

17 70. NEPA also requires that the Forest Service ensure the "scientific integrity" of the EIS,
18 40 C.F.R. § 1502.24, and "shall discuss at appropriate points in the final statement any responsible
19 opposing view which was not adequately discussed in the draft statement and shall indicate the
20 agency's response to the issues raised." *Id.* at § 1502.9(b).

21 71. The FEIS for the Kings River Project fails to adequately respond to public comments
22 submitted by plaintiffs and other interested parties on the draft EIS regarding the substantive issues
23 and errors alleged herein, as well as to other substantive public comments submitted on other NEPA
24 documents. For example, the FEIS ignored or failed to respond meaningfully to comments
25 submitted by plaintiffs regarding scientific inaccuracies and inconsistent data in the Forest Service's
26 analysis of the Kings River Project's impacts on imperiled wildlife and plant species and wildfire
27 risk.

1 identified and selected as management indicator species” based upon a finding that “their population
2 changes are believed to indicate the effects of management activities.” 36 C.F.R. § 219.19(a)(1).
3 The regulations further provide that “[p]lanning alternatives shall be stated and evaluated in terms of
4 both amount and quality of habitat and of animal population trends of the management indicator
5 species,” and “[p]opulation trends of the management indicator species will be monitored and
6 relationships to habitat changes determined.” *Id.* at § 219.19(a)(2), (6).

7 81. NFMA also requires that “[e]ach Forest Supervisor shall obtain and keep current
8 inventory data appropriate for planning and managing the resources under his or her administrative
9 jurisdiction.” 36 C.F.R. § 219.12(d). Further, “[f]orest planning shall provide for diversity of plant
10 and animal communities and tree species consistent with the overall multiple use objectives of the
11 planning area. Such diversity shall be considered throughout the planning process. Inventories shall
12 include quantitative data making possible the evaluation of diversity in terms of its prior and present
13 condition.” *Id.* at § 219.26.

14 82. To comply with the above provisions of the NFMA regulations, the Forest Service
15 has designated management indicator species at the Sierra Nevada regional level as well as
16 individually for each of the eleven Sierra Nevada national forests, including Sierra National Forest.
17 Appendix E of the 2001 Framework requires annual population monitoring of certain designated
18 management indicator species and species at risk in all Sierra Nevada national forests. This
19 requirement was adopted in the 2004 Framework.

20 83. “Management indicator species” are chosen to represent groups of species with
21 similar habitat requirements, such that maintenance of viable population levels of these species will
22 provide for viable populations of the remaining species in the group they represent. “Species at risk”
23 are those with a high level of concern regarding population status and that occur in old forest
24 ecosystems.

25 84. The Sierra National Forest LRMP requires annual population and trend monitoring
26 for several avian species in various habitats. The Sierra National Forest LRMP also requires the
27 Forest Service to minimize or eliminate direct and indirect impacts from management activities on
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1 threatened, endangered, and sensitive plants unless the activity is designed to maintain or improve
2 plant populations.

3 85. The Forest Service failed to follow the requirements for management indicator
4 species and species at risk analysis and inventories specified in Appendix E of the 2001 Framework
5 and the Sierra National Forest LRMP. Required population data for species at risk have not been
6 gathered, and baseline, trend, and/or current inventory data for many management indicator species
7 do not exist or have not been maintained.

8 86. For example, for eleven of the species analyzed in the FEIS for the Kings River
9 Project, including the Olive-sided flycatcher, the monitoring required by the Sierra National Forest
10 LRMP and Appendix E of the 2001 Framework has not been completed. There are also 28
11 additional species listed in Appendix E, such as the Swainson's Thrush, which may be affected by
12 Phase I of the Kings River Project but were not discussed in the FEIS.

13 87. Population trends for avian species in Sierra National Forest were reported by using
14 information provided in the federal Breeding Bird Survey program. However, this program fails to
15 meet the population monitoring requirements of NFMA because the survey routes selected do not
16 occur on Sierra National Forest lands and do not provide data representative of population trends in
17 Sierra National Forest. In addition, data from the Breeding Bird Survey program is too sparse,
18 limited, and unreliable to comply with the requirements in Appendix E of the 2001 Framework.

19 88. The FEIS does not quantify habitat changes from past, present, or reasonable
20 foreseeable reforestation projects that would permanently eliminate suitable habitat for sensitive
21 plant species, and also lacks viability analysis based on annual inventory of sensitive species.

22 89. Defendants' failure to adequately monitor or obtain inventory information on
23 management indicator species and species at risk prior to its approval of the Kings River Project as
24 described above violated and is continuing to violate NFMA and its implementing regulations, 36
25 C.F.R. §§ 219.12, 219.19, and 219.26, and is also arbitrary and capricious, an abuse of discretion, or
26 otherwise not in accordance with law, and without observance of procedure required by law, within
27 the meaning of the APA, 5 U.S.C. § 706(2).

1 standards for minimum numbers of large downed logs per acre or how the Project will further reduce
2 current levels of large downed logs below the minimum regional standard.

3 95. Defendants' failure to comply with the soil quality standards for the Kings River
4 Project as described above violated and is continuing to violate NFMA, 16 U.S.C. § 1604(g) and 36
5 C.F.R. § 219.27, and was also arbitrary, capricious, an abuse of discretion, not in accordance with
6 law, and without observance of procedure required by law within the meaning of the APA, 5 U.S.C.
7 § 706(2).

8 **PRAYER FOR RELIEF**

9 WHEREFORE, plaintiffs respectfully request that this Court enter judgment in their favor
10 and grant the following relief:

11 A. Issue a declaratory judgment that:

12 1. Defendants' approval of the Kings River Project and the associated Record of
13 Decision and Final Environmental Impact Statement failed to comply with the National
14 Environmental Policy Act and National Forest Management Act and their respective implementing
15 regulations;

16 2. Defendants' approval of the Kings River Project and the associated Record of
17 Decision and Final Environmental Impact Statement was arbitrary, capricious, an abuse of
18 discretion, or otherwise not in accordance with law; was without observance of procedure required
19 by law; and was unsupported by substantial evidence, in violation of the APA, 5 U.S.C. § 706(2);

20 B. Hold unlawful and set aside the Kings River Project and the associated Record of
21 Decision and Final Environmental Impact Statement, and enjoin implementation of the Project,
22 including but not limited to the advertisement of timber sales, solicitation of bids, award of contracts,
23 or authorization of the commencement of logging or other activities pursuant to the Project;

24 C. Order defendants to prepare an environmental impact statement for any new proposed
25 Kings River Project that fully complies with NEPA and NFMA;

26 D. Award plaintiffs their costs and expenses (including reasonable attorney, expert
27 witness, and consultant fees); and

28 E. Award plaintiffs such further relief as the Court deems appropriate.

1 DATED: May ____, 2007

Respectfully submitted,

2
3 _____
4 GEORGE M. TORGUN
MICHAEL R. SHERWOOD
MICHAEL GRAF

5 Attorneys for Plaintiffs Sierra Forest Legacy, Sierra
6 Club, and California Native Plant Society

7 /s/ Rachel Fazio (as authorized 5/18/07)
8 RACHEL M. FAZIO

9 Attorney for Plaintiff Earth Island Institute