Tom Wheeler, CA Bar #304191
Environmental Protection Information Center
145 G Street #A
Arcata, California 95521
tom@wildcalifornia.org
Ph: (707) 822-7711
Fax: (707) 822-7712

Counsel for Plaintiff Environmental Protection Information Center

Susan Jane M. Brown, OSB #054607, **appearance *pro hac vice***
Western Environmental Law Center
4107 N.E. Couch St.
Portland, Oregon 97232
brown@westernlaw.org
Ph: (503) 914-1323
Fax: (541) 485-2457

Peter M.K. Frost, OSB # 911843, **appearance *pro hac vice***
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401
frost@westernlaw.org
Ph: (541) 359-3238
Fax: (541) 485-2457

Counsel for Plaintiffs Karuk Tribe, Klamath Riverkeeper, Klamath-Siskiyou Wildlands Center and Center for Biological Diversity

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KARUK TRIBE, ENVIRONMENTAL PROTECTION INFORMATION CENTER, CENTER FOR BIOLOGICAL DIVERSITY, KLAMATH RIVERKEEPER, and KLAMATH-SISKIYOU WILDLANDS CENTER, Plaintiffs, v. WILLIAM STELLE, National Marine Fisheries Service; NATIONAL MARINE FISHERIES	Civ. No. 16-01079 **FIRST AMENDED COMPLAINT**

SERVICE; PATRICIA A. GRANTHAM, Klamath National Forest Supervisor; and UNITED STATES FOREST SERVICE,

Defendants.

INTRODUCTION

1. This is a civil action against the National Marine Fisheries Service ("NMFS") of the U.S. Department of Commerce, and the United States Forest Service ("USFS") of the U.S. Department of Agriculture. Plaintiffs allege NMFS violated the Endangered Species Act ("ESA") when it issued a Biological Opinion ("BiOp") and Incidental Take Statement ("ITS") for the Westside Fire Recovery Project on Forest Service lands in the Klamath River watershed. Plaintiffs further allege the USFS violated the National Environmental Policy Act and National Forest Management Act when it issued a Record of Decision ("ROD") approving the Westside Fire Recovery Project on the Klamath National Forest.

2. The Karuk Tribe has occupied lands along the Klamath River since time immemorial. Today, some of these lands comprise the Klamath National Forest, the location of the Westside Fire Recovery Project ("Project" or "Westside") challenged in this case.

3. The Karuk Tribal People continue to maintain a unique relationship with the land and value many resources as sacred. The resources utilized within the planning area consist of traditional subsistence uses such hunting, trapping and fishing, nut and seed harvesting, mushroom and berry gathering, medicinal plant gathering, and gathering of basketry-artisan materials. Sacred sites, gathering areas, hunting camps and fishing spots, and other prehistoric, historic, and contemporary use areas are scattered across the Karuk Tribe's entire ancestral territory.

4. Prior to settlement by Europeans, the mid-Klamath River watershed fire regime was characterized by frequent (occurring every 8–15 years) light surface fires of predominately low and moderate intensity, but fire suppression has changed the fire regime to less frequent but higher-intensity fires. The results of these changed conditions include increases in dead and live fuel, development of ladder fuels, and a closed canopy that can sustain a crown fire.

5. In addition to promoting fire-resilient forests, regular burning also hastens the development of complex old-growth or late-seral forest characteristics, such as basal scars, snags, cavities and large, downed woody debris. Karuk environmental management has shaped the region's ecological conditions within carefully observed natural processes and limits for millennia.

6. Karuk cultural environmental management practices sustain biodiversity by working with ecological processes, fostering habitat complexity, and enhancing the productivity and resilience of forest, grassland, and aquatic ecosystems. Karuk management supported ecological dynamics, properly functioning ecological processes in turn supported the Tribe's cultural, ceremonial, and subsistence practices.

7. However, the local terrestrial and aquatic ecosystems no longer provide the diversified resource access on an adequate scale that is vital to the perpetuation of Karuk culture.

8. Federal management of Karuk ancestral homelands has decimated many sacred sites. The Tribe's primary cultural lands—Panamaniik, Katimiin, Aamaikiaraam, Helkau, and Inam—have all experienced major disturbances from mining, logging, road construction, fire exclusion and suppression, post-fire logging, and unsustainable recreational uses.

9. The Karuk Tribe has used fire as a land management tool for thousands of years because fire is a natural part of this area's ecosystem. For the past 100 years, however, Forest Service policies have disrupted the natural fire regime by suppressing fire, preventing indigenous burning, and promoting large clear cuts of commercially valuable trees followed by plantation style re-planting of conifers. These policies have led to an increase in fire risk and severity, a loss of biodiversity, impaired water quality, and declining fisheries.

10. Without frequent fires, open meadows became choked with dense conifer trees. Plant communities changed as invasive non-native species replaced native plants. Animal communities changed as habitat disappeared or became fragmented, and salmon spawning and rearing grounds were filled with sediment from past and current federal land management policies and activities.

11. The Wild and Scenic Klamath, Salmon and Scott Rivers are within Karuk Ancestral Territory and are the lifeblood of the Karuk people.

12. These rivers are all listed as impaired under the Clean Water Act and provide some of the last strongholds and cool water refugia for wild salmon.

13. The project contains over 100 miles of threatened Coho salmon Critical Habitat, such as Grider and Walker Creeks.

14. A vast majority of the project activities are within Late Successional Reserves, which serve as Critical Habitat for the threatened Northern Spotted Owl.

15. These forests also provide vital habitat connectivity for candidate species, such as the fisher and rare and endemic species such as the Siskiyou Mountains Salamander.

16. The project is adjacent to the Marble Mountain and Russian Wilderness Areas; the Pacific Crest Trail; and within designated and eligible Wild and Scenic River Corridors, such as South Russian, Grider, and Elk Creeks, which are also watersheds designated by the Northwest Forest Plan for the highest level of protection for salmonids.

17. Despite the calls for an approach that would garner broad community support and meet multiple objectives, Defendant Klamath National Forest Supervisor Patricia Grantham remains committed to implementing an aggressive logging plan that is not only incompatible with community needs, but also is inconsistent with the Northwest Forest Plan other applicable federal laws.

18. In 2014, natural wildfires burned approximately 162,580 acres in the Klamath River watershed with mixed-severity effects to soil and vegetation.

19. Subsequently, the Forest Service proposed the Westside Project, to be implemented across 218,000 acres that include eleven major rivers and streams in the watershed. T

20. he Westside Project includes 5,760 acres of post-fire clear-cut logging of live and dead trees in some of the most steep and wild mountains on the West Coast.

21. Nearly 2,000 acres of this “salvage” sale include “units” to be logged that include geologically unstable landslide terrain.

22. The Westside Project also proposes to clear and construct over 100 landing sites, cleared areas in the forest where cut trees are yarded or skidded for loading onto log trucks.

23. The economic analysis for the Westside Project was predicated on receiving between $100 and $240/million board foot ("mbf") for various species of tree to be harvested.

24. The first timber sales offered for sale were estimated in value of $6-$10/mbf.

25. Because the Westside Project will adversely affect coho salmon and its critical habitat, the Forest Service consulted with NMFS under Section 7 of the ESA regarding effects of the project.

26. On January 15, 2016, NMFS issued a BiOp that found the Westside Project will not jeopardize the continued existence of coho salmon or adversely modify its critical habitat.

27. NMFS also issued an ITS that relied upon a "take surrogate" to establish a permissible level of "take" of coho salmon projected to result from the project.

28. On February 29, 2016, the USFS issued a ROD approving the Westside Project.

29. On March 3, 2016, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief in this court.

30. Plaintiffs subsequently filed this First Amended Complaint.

JURISDICTION

31. This Court has jurisdiction pursuant to 28 U.S.C. § 1331. NMFS' BiOp and ITS, and the USFS's final environmental impact statement ("FEIS") and ROD comprise final agency actions subject to judicial review under the Administrative Procedure Act ("APA").

32. This Court may issue declaratory relief pursuant to 28 U.S.C. § 2202.

33. This Court may issue injunctive relief pursuant to 28 U.S.C. § 2201, 5 U.S.C. § 702, and 5 U.S.C. § 706.

34. An actual, justiciable controversy exists between Plaintiffs and Defendants.

INTRADISTRICT ASSIGNMENT

35. Venue in this court is proper under 28 U.S.C § 1391(1)(b). Plaintiffs Karuk Tribe, Environmental Information Protection Center, Klamath Riverkeeper, and Center for Biological

Diversity reside in this District. Defendants reside in this district. The Western Regional Office of NMFS, which issued the BiOp and ITS, is based in Santa Rosa, California.

PARTIES

36. Plaintiff KARUK TRIBE is a federally-recognized Indian Tribe that occupies aboriginal land along the middle course of the Klamath and Salmon Rivers in Northern California. The Karuk Tribe's Aboriginal Territory has been previously mapped, and includes an estimated 1.38 million acres within the Klamath River Basin. Nearly all of Karuk Aboriginal Territory is located within lands administered by the Klamath National Forest and the Six Rivers National Forest. Karuk Tribe trust lands are composed of individual and Tribal Trust properties scattered along the Klamath River between Yreka and Orleans, California, with Tribal centers and administrative facilities located in Happy Camp, Orleans, Somes Bar, and Yreka. The Karuk Tribe values the interests and wellbeing of the Karuk People. The values associated with this well-being are primarily health, justice, economic security, education, housing, self-governance, as well as the management and utilization of cultural/natural resources within and adjacent to the Karuk Aboriginal Territory now and forever. The Karuk Tribe also values the interests and well-being of the general public, and applicable Tribal services and management principals are extended to the general public as a secondary benefit. It is a belief of the Karuk Tribe that the values stated above must be managed in a manner consistent with Karuk tradition, custom, culture and ceremonial principles in order to ensure cultural perseverance.

37. The Karuk Tribe has a unique vested interest in these lands because of their location and relation to their aboriginal homelands. The families from the villages in the Karuk Aboriginal Territory, as well as other Tribal members, have occupied and utilized the cultural/natural resources throughout the territory since time immemorial. Tribal People continue to maintain a unique relationship with the land and value many forest resources as sacred. The Karuk Tribe would be irreparably injured by the Westside Project.

38. Plaintiff ENVIRONMENTAL PROTECTION INFORMATION CENTER ("EPIC") is a nonprofit public benefit corporation organized under the laws of California. Since 1977, EPIC has defended the wildlife and wild places of the Klamath Mountains and North Coast Range.

EPIC's mission is science-based protection and restoration of Northwest California's forests and seeks to ensure that a connected landscape exists for species survival and climate adaption. EPIC's advocacy utilizes community organizing, public education, collaboration, and litigation and submits substantive comments on projects that would negatively impact public and private forestlands. EPIC maintains an office in Arcata, California. Most of the 2,000 members and 13,000 supporters live in northern California. EPIC's members and staff use, enjoy, and recreate on public lands and Wild and Scenic Rivers, including those within the project area on the Klamath National Forest, and would be irreparably injured by the Westside Project.

39. Plaintiff KLAMATH RIVERKEEPER is a community-based non-profit organization based in the Klamath Basin of Northern California and Southern Oregon. Klamath Riverkeeper's mission is to restore water quality and fisheries in the Klamath Basin, bringing vitality and abundance back to the rivers and the people who depend on them. Klamath Riverkeeper works closely with the Klamath River tribes, fishing communities, and recreational groups in all aspects of its programs. Klamath Riverkeeper has an active membership of people from all over the Klamath Basin that use the Klamath National Forest for recreation, education, fishing, aesthetic enjoyment and spiritual renewal. This use includes observing and studying the migration of anadromous fish. Klamath Riverkeeper is a membership organization and has members who would be irreparably injured by the Westside Project.

40. Plaintiff KLAMATH-SISKIYOU WILDLANDS CENTER ("KS Wild") is a domestic non-profit corporation organized and existing under the laws of the State of Oregon. KS Wild's main offices are in Ashland, Oregon. KS Wild has 3,500 members in over 10 states, with most members concentrated in southern Oregon and northern California. On behalf of its members, KS Wild advocates for the forests, wildlife, and waters of the Rogue and Klamath Basins and works to protect and restore the extraordinary biological diversity of the Klamath-Siskiyou region of southwest Oregon and northwest California. KS Wild uses environmental law, science, education, and collaboration to help build healthy ecosystems and sustainable communities. Through its campaign work, KS Wild strives to protect the last wild areas and vital biological diversity of the Klamath region. KS Wild is a leader in protecting California's national forests

and routinely participates in commenting, monitoring, and litigation affecting public lands in California. KS Wild is a membership organization and has members who would be irreparably injured by the Westside Project.

41. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("Center") is a California nonprofit public benefit corporation with more than 48,000 members dedicated to the preservation, protection, and restoration of biodiversity and ecosystems in northern California and throughout the world. On behalf of its members, the Center works to insure the long-term health and viability of animal and plant species and to protect the habitat those species need to survive. The Center also has a procedural interest in the proper management of these lands in full compliance with mandatory public land and environmental laws and regulations. The Center is a membership organization and has members who would be irreparably injured by the Westside Project.

42. Defendant WILLIAM STELLE is the Regional Administrator for the West Coast Region of NMFS. Mr. Stelle is sued in his official capacity. Mr. Stelle signed the BiOp and ITS.

43. Defendant NATIONAL MARINE FISHERIES SERVICE is an agency within the U.S. Department of Commerce and a subdivision of the National Oceanic and Atmospheric Administration. NMFS is responsible for the recovery of coho salmon under the ESA.

44. Defendant PATRICIA GRANTHAM is the Forest Supervisor for the Klamath National Forest. Ms. Grantham is sued in her official capacity. Ms. Grantham signed the ROD.

45. Defendant UNITED STATES FOREST SERVICE is an agency within the U.S. Department of Agriculture. USFS manages the Klamath National Forest.

SUMMARY OF LAW AND FACTS

Administrative Procedure Act

46. The Administrative Procedure Act (APA) confers a right of judicial review on any person that is adversely affected by agency action. 5 U.S.C. § 702. Upon review, the court shall "hold unlawful and set aside agency actions...found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2).

The National Forest Management Act

47. The National Forest Management Act (NFMA) requires the Forest Service to develop comprehensive land and resource management plans (LRMPs) for each unit of the National Forest System. 16 U.S.C. § 1604(a).

48. Subsequent "plans, permits, contracts, and other instruments for the use and occupancy" of the national forests must be consistent with the local LRMP, in this case, the Klamath National Forest Land and Resource Management Plan, as amended. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e).

The Northwest Forest Plan

49. In 1994, the Bureau of Land Management and the United States Forest Service issued a Record of Decision for the *Northwest Forest Plan (NFP),* which established management requirements for all Forest Service land within the range of the northern spotted owl and amended all National Forest LRMPs within the range of the owl, including the Klamath National Forest LRMP.

Late-Successional Reserves

50. Late-Successional Reserves (LSR) are land use allocations under the NFP where the primary objective is to protect and enhance the conditions of old-growth forests that serve as habitat for the northern spotted owl and other late-successional habitat-associated species by creating a network of large "reserves" or blocks of habitat.

51. The NFP requires the Forest Service to manage LSRs to "protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species." .

52. The NFP permits logging in LSRs, but restricts the timing, location, type, and amount of salvage logging that may occur.

53. First, the NFP requires salvage logging within LSRs to be consistent with LSR Objectives, including the "development of old-growth forest characteristics including snags." Snags are standing dead trees.

54. Second, the NFP states that within LSRs, "while priority should be given to salvage in areas where it will have a positive effect on late-successional forest habitat, salvage operations should not diminish habitat suitability now or in the future."

55. Third, the NFP states that following stand replacing events such as wildfire, the Forest Service must "focus on retaining snags that are likely to persist until late-successional conditions have developed and the new stand is again producing large snags."

56. Finally, the NFP states that in LSRs, "salvage will not be driven by economic…factors."

57. The lands affected by the Westside Project lie largely within two Klamath Late Successional Reserves: the Seiad LSR and Eddy Gulch LSR.

58. The Seiad LSR, given its size and juxtaposition to the Marble Mountain Wilderness, plays an important role in providing large refugia for spotted owls and numerous other late-successional associated species.

59. The Seiad LSR also provides direct refugia for anadromous species.

60. The Eddy Gulch LSR has its origin as a Habitat Conservation Area (HCA) under early northern spotted owl protection regimes, and the intent of the designation was to provide habitat that would support 20 pairs of northern spotted owls in the future.

61. In addition to northern spotted owl habitat, the Eddy Gulch LSR contributes to anadromous fish refugia primarily in the form of high quality water and watershed habitat elements such as large downed wood and gravel, to downstream habitat.

Aquatic Conservation Strategy

62. The Aquatic Conservation Strategy (ACS) of the NFP was developed to restore and maintain the ecological health of watersheds and aquatic ecosystems contained within them, and to protect salmon and steelhead habitat on federal lands.

63. The ACS accomplishes its goals through mandatory compliance with nine Aquatic Conservation Strategy Objectives (ACSOs).

64. The nine ACSOs are: (1) Maintain and restore the distribution, diversity, and complexity of watershed and landscape-scale features to ensure protection of the aquatic systems to which species, populations and communities are uniquely adapted; (2) Maintain and restore spatial and

temporal connectivity within and between watersheds. Lateral, longitudinal, and drainage network connections include floodplains, wetlands, upslope areas, headwater tributaries, and intact refugia. These network connections must provide chemically and physically unobstructed routes to areas critical for fulfilling life history requirements of aquatic and riparian-dependent species; (3) Maintain and restore the physical integrity of the aquatic system, including shorelines, banks, and bottom configurations; (4) Maintain and restore water quality necessary to support healthy riparian, aquatic, and wetland ecosystems. Water quality must remain within the range that maintains the biological, physical, and chemical integrity of the system and benefits survival, growth, reproduction, and migration of individuals composing aquatic and riparian communities; (5) Maintain and restore the sediment regime under which aquatic ecosystems evolved. Elements of the sediment regime include the timing, volume, rate, and character of sediment input, storage, and transport; (6) Maintain and restore in-stream flows sufficient to create and sustain riparian, aquatic, and wetland habitats and to retain patterns of sediment, nutrient, and wood routing. The timing, magnitude, duration, and spatial distribution of peak, high, and low flows must be protected; (7) Maintain and restore the timing, variability, and duration of floodplain inundation and water table elevation in meadows and wetlands; (8) Maintain and restore the species composition and structural diversity of plant communities in riparian areas and wetlands to provide adequate summer and winter thermal regulation, nutrient filtering, appropriate rates of surface erosion, bank erosion, and channel migration and to supply amounts and distributions of coarse woody debris sufficient to sustain physical complexity and stability; and (9) Maintain and restore habitat to support well-distributed populations of native plant, invertebrate, and vertebrate riparian-dependent species.

65. In order to make the finding that a project or management action "meets" or "does not prevent attainment" of the ACS objectives, project-level analysis must include a description of the existing condition, a description of the range of natural variability of the important physical and biological components of a given watershed, and how the proposed project or management action maintains the existing condition or moves it within the range of natural variability.

66. "Management actions that do not maintain the existing condition or lead to improved conditions in the long term would not "meet" the intent of the ACS and thus, should not be implemented."

67. The Westside Project will impact two core facets of the ACS: Riparian Reserves and Key Watersheds.

Riparian Reserves

68. Riparian Reserves are a land allocation under the NFP covering "portions of watersheds where riparian-dependent resources receive primary emphasis and where special standards and guidelines apply."

69. The Northwest Forest Plan Standards and Guidelines "prohibit and regulate activities in Riparian Reserves that retard or prevent attainment of the Aquatic Conservation Strategy objectives."

70. Riparian Reserves generally parallel "standing and flowing water, intermittent stream channels and ephemeral ponds, and wetlands," and "also include other areas necessary for maintaining hydrologic, geomorphic, and ecologic processes" such as geologically "unstable and potentially unstable" areas.

71. The NFP requires the Forest Service to designate all Riparian Reserves, and to protect them from disturbance via no-entry or no-harvest buffers.

72. For geological Riparian Reserves (i.e., unstable areas), the NFP states that "at a minimum, the Riparian Reserves must include: (a) The extent of unstable and potentially unstable areas (including earthflows); (b) The stream channel and extend to the top of the inner gorge; (c) The stream channel or wetland and the area from the edges of the stream channel or wetland to the outer edges of the riparian vegetation; and (d) Extension from the edges of the stream channel to a distance equal to the height of one site-potential tree, or 100 feet slope distance, whichever is greatest. A site-potential tree height is the average maximum height of the tallest dominant trees (200 years or older) for a given site class."

73. Riparian Reserves are designed to protect the integrity of aquatic ecosystems, so the NFP prohibits logging within a Riparian Reserve unless the Forest Service can demonstrate that

logging is "required to attain," "is needed to attain," and "will not adversely affect" the nine Aquatic Conservation Strategy Objectives that are designed to protect water quality.

74. In addition to the standards and guidelines for Riparian Reserves in the NFP, the Klamath National Forest's Forest Plan requires that "vegetation on geologically unstable lands (including active landslides, all inner gorges, margins and toe zones of dormant landslides and severely weathered and dissected granitic lands)" be managed "to maintain or enhance slope stability and soil productivity according to Riparian Reserve standards and guidelines."

75. The Westside Project would allow significant logging within Riparian Reserves. The Westside final environmental impact statement (FEIS) states: "There are about 3,900 acres of salvage units proposed on steep, weathered granitic lands (geological riparian reserves) in the proposed action as scoped; in refined alternative 2, salvage is proposed on geological Riparian Reserves on about 2,000 out of 3,900 acres of salvage units and other action alternatives propose the same amount or less."

76. The Westside FEIS designates up to 4,400 acres of roadside hazard tree removal, 3,900 acres of fuel hazard treatments and about 960 acres of site preparation and planting on unstable lands considered to be geological Riparian Reserves.

Key Watersheds

77. Key Watersheds are "large refugia comprising watersheds that are crucial to at-risk fish species and stocks and provide high quality water," and are not a unique land classification but overlay other land use classification such as Late-Successional Reserves, Riparian Reserves, and Matrix lands.

78. Tier 1 Key Watersheds are designed to contribute to the conservation of at-risk anadromous and non-anadromous fish stocks; Tier 2 Key Watersheds provide high quality water, and may also contain at-risk fish stocks; and non-Key Watersheds meet neither description.

79. Key Watershed designations "place additional management requirements...on activities in those areas."

80. The Westside Fire Recovery Project lies largely within three Tier 1 Key Watersheds: Salmon River, Elk Creek, and Grider Creek.

The Klamath-Siskiyou Bioregion

81. The Klamath National Forest makes up the heart of the Klamath-Siskiyou Bioregion, an ecoregion covering approximately 10 million acres, stretching from the Umpqua River in Oregon to Mendocino County, California to the south, from the Pacific Ocean in the west to the Cascade Mountains in the east.

82. By its location, the bioregion serves as a junction and transition zone between Great Basin, the Oregon Coast Range, the Cascades Range, the Sierra Nevada, the California Central Valley, and Coastal Province of Northern California.

83. The Klamath-Siskiyou Bioregion is marked by its complex geology, a tangled knot of steep, rugged mountains and numerous cold-water rivers.

84. Located just outside of the southern terminus of glaciers in recent ice ages, the Klamath-Siskiyou Bioregion has remained largely undisturbed and has acted as biological refuge, allowing for the preservation and adaptation of numerous fauna and flora.

85. The forest and mountains of the region have been shaped by wildfire and by cultural fires managed by Native Americans, creating biodiversity here that is fire-dependent, meaning that it is largely reliant on fire and its effects for survival.

86. Owing its rugged and wild nature, the bioregion has largely escaped human development and is sparsely populated. The bioregion is home to the largest concentration of roadless areas and designated Wilderness areas on the contiguous West Coast of the United States.

87. As a result of the areas' unique natural history and natural heterogeneity, the bioregion is home to nearly unparalleled biodiversity, earning it the nickname of the "Galapagos of North America."

88. The region is perhaps most famous for its record setting conifer diversity, including 36 different species; some of which, like the Port Orford cedar, are found only in the bioregion, and others, like the Alaska yellow cedar, exist at the far end of their range.

89. The bioregion is also home to 3,500 vascular plant species, 280 of which are endemic.

90. The bioregion also supports abundant wildlife. At special issue here are Klamath River fish species, northern spotted owls, and bald eagles.

91. The Klamath River and two of its larger tributaries, the Scott and Salmon River are components of the National Wild and Scenic River System. They were designated for their outstandingly remarkable anadromous fisheries values.

92. Despite their important habitat and cultural values, the Klamath River, Scott River and the North Fork of the Salmon River are all listed as impaired under section 303(d) of the Clean Water Act, meaning that these waters currently do not meet water quality standards.

93. Portions of the Klamath River mainstem are 303(d) listed for nutrients, organic enrichment/low dissolved oxygen, temperature and sediment.

94. The Scott River is 303(d) listed for temperature and sediment.

95. The Salmon River is 303(d) listed for temperature.

96. In addition to major tributaries, other minor tributaries are likewise important to the health of the Klamath River and its aquatic wildlife. Minor tributaries particularly impacted by the Westside Project include Grider Creek and Walker Creek.

97. The largest concentration of logging units proposed in the Westside project are within the Grider and Walker Creek watersheds, located within the Happy Camp Fire Complex area.

98. Grider and Walker Creeks are bordered by geologic Riparian Reserves and have a long and well-documented history of landslides and road-related sediment issues.

The Klamath River and its tributaries support several anadromous species during most of their in-river life stages, including chinook salmon (spring- and fall-runs), coho salmon, steelhead trout (summer- and winter-runs), coastal cutthroat trout, green and white sturgeon, and Pacific lamprey.

Coho Salmon (*Oncorhynchus kisutch*)

99. Coho salmon in the Klamath River are listed as "threatened" under the federal Endangered Species Act and the California Endangered Species Act.

100. The salmon and steelhead fishery on the Klamath River supports a sport fishing guide and resort industry, Native American subsistence and ceremonial culture, and commercial and sport fishing industries.

101. Coho salmon is an anadromous fish species that generally exhibits a three-year life cycle.

102. Adult coho typically begin their freshwater spawning migration in late summer and early fall, spawn by mid-winter, and then die. Coho salmon spawning occurs mainly in November to December. Spawning occurs in mainstem rivers, and in tributaries and creeks.

103. Juvenile coho rear in fresh water for up to 15 months. Rearing coho juveniles require a complex stream morphology of pools, riffles, and backwaters created by large downed trees in the stream channel. Complex habitat structure helps protect juvenile coho from predators, and from high water flows that can occur during the winter.

104. Coho smolts migrate to the ocean in the spring. Coho adults typically spend 15 months in the ocean before returning to their natal stream to spawn.

105. Coho salmon were historically distributed throughout the North Pacific Ocean from Central California north to Point Hope, Alaska.

106. NMFS has identified six "evolutionary significant units" ("ESU") of coho in the region. One ESU is Southern Oregon/Northern California Coast ("SONCC") coho, which is comprised of forty-one populations ranging from Punta Gorda, California, north to Cape Blanco, Oregon.

107. In 1997, NMFS listed SONCC coho as threatened with extinction under the ESA, and found that logging is one of the major activities responsible for the decline of SONCC coho by removing and disturbing natural vegetation that affects in-stream habitat.

108. NMFS has found that timber harvest remains a "high" or a "very high" threat to 20 of 39 populations of SONCC coho.

109. In 1999, NMFS designated critical habitat for SONCC coho salmon that encompasses accessible reaches of all rivers (including estuaries areas and tributaries) between the Mattole River in California and the Elk River in Oregon.

110. In 2011, NMFS completed a status review of SONCC coho and concluded that SONCC coho are trending in declining abundance.

111. Sediment generated by logging, road building and use, landing construction, and associated activities can harm SONCC coho salmon and their habitat by smothering eggs and preventing emergence, reducing inter-gravel oxygen, increasing turbidity in the water column

that interferes with sight-feeding, burying macroinvertebrate insects and their habitat that provide food for coho, and aggrading streambeds.

Northern Spotted Owl (*Strix occidentalis caurina*)

112. The northern spotted owl is one of three subspecies of spotted owl.

113. Northern spotted owls are generally associated with older forests as they prefer high, mostly-closed canopy and utilize "decadent" features, such as broken tops, cavities, and deformed limbs.

114. Northern spotted owls are known to utilize sub-ideal habitat as well, which may be missing some of the usual habitat elements, such as a closed canopy.

115. Utilization of sub-ideal habitat has been particularly recognized in the Klamath-Siskiyou Bioregion.

116. While fire removes some of the habitat elements associated with northern spotted owl habitat, research indicates that spotted owls continue to utilize post-fire forests, primarily for foraging.

117. Northern spotted owls, however, do not utilize areas that have been burned and then logged. Thus, while fire may degrade habitat, logging removes habitat.

118. Post-fire logging may further inhibit the development of future northern spotted owl habitat by reducing forest complexity.

119. The northern spotted owl was listed under the federal Endangered Species Act as "threatened" in 1990, citing loss of habitat as its primary threat.

120. The Northwest Forest Plan was created in part to provide for the preservation of the northern spotted owl by amending the management plans for federal forests within the range of the species.

121. Despite implementation of the Northwest Forest Plan, the northern spotted owl continues to decline across its range.

122. Northern spotted owls in the Klamath-Siskiyou Bioregion have been identified as uniquely important to the health of the species because owls in the area serve as a "source" population.

123. As described by Gutiérrez and Harrison (1996), source populations "grow and produce emigrants" whereas "sink" populations "cannot sustain themselves in the absence of immigration." Identification of source-sink dynamics is important for conservation research and planning.

124. According to the Biological Opinion completed for the Project by the United States Fish and Wildlife Service, the Project is likely to result in the incidental take of up to 103 northern spotted owls because the Project will "significantly disrupt the breeding, feeding, and sheltering behavior of these [northern spotted owls] to an extent that causes injury or death."

125. No single timber sale implemented since the adoption of the Northwest Forest Plan has resulted in the incidental take of as many spotted owls as the Westside Fire Recovery Project.

Bald Eagle (*Haliaeetus leucocephalus*)

126. In addition to serving as important fish habitat the Klamath River also supports an abundance of raptors, including the bald eagle.

127. Bald eagles show a high fidelity to their nesting and roosting areas. Nest sites are important to bald eagles. Eagles mate for life, choosing the tops of large trees to build nests, which they typically use and enlarge each year. Nests may reach 10 feet across and weigh a half ton. They may also have one or more alternate nests within their breeding territory.

128. According to the Westside DEIS, there are four known bald eagle nest sites and three known winter roost sites within the project area. All four nest sites have been active recently and are likely to continue to be active.

129. One of these nest sites is occupied by a pair known as the "Caroline Creek Bald Eagle pair," which has been a known active pair since the early 1970s. Their nesting area was designated as a Management Unit in the Klamath National Forest Bald Eagle Habitat Management Plan in 1975 and was designated as Management Area 5 in the Forest Plan.

Soil Resources

130. According to the Forest Service, "an adequate level of soil cover is needed to maintain soil stability and prevent accelerated erosion. Effective soil cover consists of low growing live vegetation (12 inches high), rock fragments (greater than ½ inch in diameter), slash (any size),

and fine organic matter (charred or not) that is in contact with the soil surface. Fine organic matter refers to the duff, litter, and twigs less than three inches in diameter. Effective soil cover is the most important soil property in maintaining soil stability and reducing erosion. Surface cover mitigates erosion primarily by intercepting and reducing the detachment energy of raindrops, improving soil porosity, preventing soil sealing, and increasing surface roughness to slow and filter runoff (Larsen et. al. 2009). The percent bare soil is an important control on sediment production following timber salvage (Chase 2006). The presence of even a thin litter layer can substantially reduce soil erosion (Peterson 2009)."

131. Surface organic matter is organic material on top of the mineral soil and may range in size from needles and twigs, to coarser materials such as branches and logs. These materials are major sources of ecosystem nutrients, such as nitrogen, which is essential for plant growth.

132. Soil organic matter, also known as soil humus, is the highly decomposed organic material that is incorporated into the mineral portions of the soil. Soil organic matter is important for holding soil water, cycling nutrients, and reducing soil strength. Impacts to soil organic matter generally come from both excessive soil heating and soil displacement from mechanical disturbances. Soil heating volatizes both the complex organic compounds and plant nutrients. Changes in the soil organic matter can affect soil nutrient cycling, water holding capacity and aggregate stability.

133. Soil structure is important for hydrologic function, as well as for providing appropriate conditions for vegetative regrowth after disturbance. Soil compaction and increased soil strength can slow plant growth, impede root development, restrict water infiltration and percolation, and increase overland flow during high precipitation events, and can cause plant nutrients to be relatively immobile or inaccessible.

Westside Fire Complex

134. In 2014, wildfires burned on the Happy Camp/Oak Knoll and Salmon/Scott River Ranger Districts of the Klamath National Forest.

135. The Happy Camp Complex fires were ignited by lightning near the town of Happy Camp. Of the 19 fires comprising the complex, three escaped containment, burning separately for

several weeks before eventually growing together. In total, the Happy Camp Complex burned approximately 117,000 acres.

136. The Beaver Fire occurred on the north side of the Klamath River about 30 miles east of Happy Camp, and eventually consumed approximately 32,400 acres.

137. The July Complex was comprised of the Log and Whites Fires, and burned approximately 37,000 acres within the Scott and North Fork Salmon River watersheds.

138. Combined, the Beaver Fire, Happy Camp Complex, and Whites Fire burned a total of 183,100 acres, including 162,580 acres of National Forest System lands and 20,910 acres of private land.

139. Together, these fires are known as the Westside Fire Complex.

140. The Westside Fire Complex area is located in the middle portion of the Klamath River basin. The middle portion of the Klamath River basin extends from Iron Gate Dam (river mile 190) downstream to the confluence with the Trinity River (river mile 43.5).

141. The fires burned with mixed severity, which means that within the Westside Fire Complex, there was a mosaic of none, light, moderate, and severely burned areas within each fire.

142. Within the complex as a whole, twenty-two to thirty percent (22-30%) of the burned areas were rated as medium in severity. Within the complex, one to six percent (1-6%) of the burned areas were rated as high in severity. Sixty-four percent (64%) of the burned areas were neither medium nor high in severity.

143. Without removal, large dead, dying, and fire damaged trees may stand for decades.

144. Without removal, standing dead, dying, and fire damaged trees contribute to the complexity of regenerating forests, and are critical components of complex early seral habitat.

The Westside Fire Recovery Project

145. Before the Happy Camp Complex was contained, the Forest Service initiated scoping for the Westside Fire Recovery Project.

146. The project planning area is within Karuk Aboriginal Territory.

147. On March 13, 2015, the Forest Service issued a draft environmental impact statement ("DEIS") to assess the environmental consequences of the Westside Project.

148. Plaintiffs Karuk Tribe, Klamath Riverkeeper, EPIC, KS Wild, and the Center submitted comments on the DEIS.

149. In July, 2015, the Forest Service released a final environmental impact statement ("FEIS") for the Westside Project.

150. In order to facilitate implementation of the project, Defendants sought an Emergency Situation Determination (ESD) from the Chief of the Forest Service pursuant to 36 C.F.R. § 218.21.

151. The Chief of the Forest Service granted the Defendants an ESD on May 15, 2015.

152. Consequently, there is no provision for administrative challenge to the Westside Project.

153. On February 29th 2016, the USFS issued a Record of Decision for the Project.

154. The Westside Project includes a project area encompassing 218,000 acres: 187,100 acres of National Forest System land and 31,500 acres of private land; the logging challenged in this action will take place on National Forest System lands.

155. The Westside Project area is divided into three subparts: project area A (Beaver Fire), project area B (Happy Camp), and project area C (Whites Fire).

156. The Westside Project authorizes commercial salvage harvest and reforestation on 5,760 acres.

157. Acres to be logged are within eleven fifth field watersheds.

158. Standing dead, dying, and fire damaged trees at least 14 inches in diameter at breast height ("dbh") will be selected for logging.

159. Commercial salvage harvest is expected to be completed over a two-year period.

160. The Westside Project authorizes logging on approximately 3,700 acres along about 320 miles of roadways, including an estimated 1,200 acres of concentrated hazard tree removal in higher severity burn areas, and an estimated 2,500 acres of scattered hazard tree removal in lower severity burn areas.

161. Hazard tree removal includes operations along 11.2 miles roads used by the public and for administrative use under separate authority.

162. Hazard tree removal is intended to protect public health and safety.

163. Plaintiffs do not contest or challenge hazard tree removal along roads.

164. To facilitate logging, the Westside Project authorizes construction, use, or reopening of approximately 12.7 miles of temporary or decommissioned roads.

165. To facilitate logging, the Westside Project authorizes use of 40 existing landings for staging of log yarding and hauling operations.

166. In addition, 75 new landings will be constructed that will be used for individual helicopter landings, individual skyline landings, and ground-based landings.

167. Combined, construction of new landings will total up to 130 acres. Helicopter landings will be up to two acres in size. Skyline and ground-based landings will be up to one and one-half acres in size.

168. The Westside Project authorizes "fuel reduction treatments" on approximately 24,450 acres where the 2014 wildfires caused moderate and high vegetation mortality.

169. "Fuel reduction treatments" will occur in approximately 3,594 acres of riparian reserves.

170. Trees up to 16-inches in diameter will be cut and felled in riparian reserves.

171. Fuel treatments will occur within ten years after salvage harvest and hazard tree removal have been completed.

172. Currently, natural forest regeneration (conifer and vegetative regrowth) is occurring within the planning area, including within units proposed for salvage and replanting.

173. Flushing, a resurgence of new green needles, is currently occurring on many of the Ponderosa pine trees within the salvage units of the project area.

174. The Westside Project authorizes site preparation, artificial reforestation, and release on approximately 12,700 acres. Site preparation means the reduction of fuels in areas that have previously been logged, and where fuel loads exceed seven tons per acre or in previous plantations identified as unable to naturally recover. Artificial reforestation means the planting of conifer species to aid in the artificial reforestation of an area. Reforestation may be necessary to

establish forests in areas that have been salvage logged, as logging inhibits the natural regeneration of forests. Release means actions taken to reduce competition for conifers, such as cutting back competing brush, to encourage faster tree growth. Cumulatively, these actions are intended to decrease the time to establish a new conifer forest.

175. Artificial reforestation and release are unlikely to be funded from revenue from timber receipts and, as such, are uncertain to occur.

176. Artificial reforestation is likely to produce less complex forests than naturally reoccurring reforestation.

177. There are few (if any) documented instances of northern spotted owls selecting artificially replanted stands over naturally regenerating stands for foraging.

178. The Westside Project authorizes "legacy sediment site treatments" at approximately 158 locations that are intended to reduce sediment mobilization and delivery into streams.

179. These treatments will occur along Forest Service roads and at stream crossings, and some legacy sites are located on existing landings or on roadbeds.

180. Legacy treatments include culvert upgrades at 45 sites; "diversion prevention" at 51 sites; "aquatic organism passage improvement" at 3 sites; "retaining wall construction" at 7 sites; "fill reduction" at 16 sites; "fill removal" at 27 sites; and "culvert/ditch infrastructure repair or maintenance" at 16 sites.

181. According to the FEIS, legacy site treatment is limited to the Elk Creek watershed.

182. The majority of project work likely to contribute sediment pollution will occur in the Grider Creek and Walker Creek watersheds.

183. Treatment of legacy sites for the Westside Project is expected to begin in 2019.

184. Treatment of legacy sites may take up to 20 years or longer to complete.

185. Treatment of legacy sites depends on funding.

186. Funding for treatment of legacy sites is currently uncertain and speculative.

187. Legacy treatment sites are outside of and at least 300 feet upstream from SONCC coho salmon critical habitat.

188. No legacy sites are located in any occupied SONCC coho salmon habitat.

189. Prescribed burning may continue for several years following completion of other vegetation treatment activities.

The Westside Project BiOp and Incidental Take Statement

190. The majority of the watersheds in the Westside Project area have steep soil-covered hillslopes that are at or near "sediment mobilization thresholds," meaning they are highly prone to landslides. Habitat for SONCC coho in the Westside Project area has been affected by sediment erosion and passage barriers in the project area. The Westside Fire Complex made the landscape more vulnerable to surface erosion and soil movement, due to the loss of ground cover, reduced soil cohesion from the loss of rooted plants, and increased water yield.

191. In July and early August, 2015, thunderstorms occurred in several watersheds within the Westside Project area, in many cases overlapping with steep slopes and areas burned in 2014.

192. The August 2015 thunderstorms triggered sediment-laden debris flows into SONCC coho critical habitat, including in the North Fork Salmon River, South Russian Creek, Whites Gulch, Beaver Creek, Walker Creek, Grider Creek, Elk Creek, lower Scott River, and the mainstem Klamath River.

193. The debris flows resulted in complete infilling of pools, leaving thick lenses of sediment on top of former streambeds, and otherwise elevated turbidity.

194. This elevated turbidity will persist as streams continue to incise through streambed sediment lenses; this winnowing process could take years.

195. The Westside Project will occur in the Beaver Creek, Elk Creek, Horse Creek-Klamath River, Humbug Creek-Klamath River, Indian Creek, Lower Scott River, North Fork Salmon River, Seiad Creek-Klamath River, South Fork Salmon River, Thompson Creek-Klamath River and Ukonom Creek-Klamath River watersheds. All of these watersheds provide habitat for SONCC coho.

196. The Westside Project will impact five coho populations within the SONCC coho ESU.

197. The Upper Klamath River coho salmon population has a high extinction risk. Numbers of Upper Klamath River coho salmon population are likely below the depensation threshold.

198. The Middle Klamath River coho salmon population has a moderate extinction risk. The population of Middle Klamath River coho salmon is likely above the depensation threshold.

199. The Salmon River coho salmon population has a high extinction risk. The population of Salmon River coho salmon is likely above the depensation threshold.

200. The Scott River coho salmon population has a moderate extinction risk. The population of Salmon River coho is likely above the depensation threshold.

201. The Shasta River coho population has a high extinction risk. The Shasta River coho salmon population is likely below the depensation threshold.

202. On January 16, 2016, NMFS issued the BiOp and ITS for the Westside Project.

203. NMFS found the Westside Project will cause hydrologic alterations, increased sediment erosion and transport to streams, and altered ecological recovery in affected watersheds.

204. NMFS found the Westside Project will result in effects to hydrology caused by ground disturbances from timber salvage harvest and yarding, construction of landings and temporary roads, and log hauling on roads.

205. NMFS found the Westside Project will cause an increase in sedimentation in all but one of the watersheds affected by the project.

206. NMFS found the Westside Project will cause an increase in erosion, landslide risk, and water temperatures.

207. NMFS found the Westside Project will cause a decrease in watershed recovery, habitat availability, availability of large woody debris, and water quality.

208. NMFS found that effects to SONCC coho salmon critical habitat may result from other activities authorized under the Westside Project, including (1) decreased habitat availability at the site level at and immediately downstream from water drafting sites, coincident with drafting activities; (2) increased water temperatures due to loss of stream shading at the site level from hazard tree felling and brushing out of drafting access points, as well as increased water temperatures downstream from tributary water drafting sites during active pumping; (3) decreased water quality from chemical spills associated with the operation of mechanized

equipment near stream channels; and (4) decreased large woody debris recruitment/availability associated with hazard tree removal.

209. NMFS found that salvage harvest will result in adverse effects to individual SONCC coho salmon for approximately ten years.

210. Landslides are evaluated in the BiOp as they may affect SONCC coho by modifying its habitat.

211. The fires of 2014 increased the landslide risk in the Westside Project area through a loss of root strength caused by tree mortality. Root strength decreases over time after tree death.

212. NMFS found forest management involving timber harvest, fire suppression, and road system use can exacerbate climate and fire regime effects on landslide risk.

213. NMFS found the Westside Project will increase the landslide or "mass wasting" risk above the post-fire baseline.

214. In evaluating the landslide risk, NMFS analyzed the risk separately from the Equivalent Roaded Area (ERA) model because the ERA model is not appropriate for evaluating landslide risk.

215. NMFS identified multiple project activities which may contribute to landslide risk, including reopening of decommissioned roads, use of temporary roads on existing roadbeds, construction of new temporary roads, and the construction of new landings.

216. The Grider Creek and Walker Creek areas are susceptible to landslides. The Grider Creek and Walker Creek areas are underlain by highly weathered and dissected granitic lands. These watersheds are susceptible to shallow landsliding, such as debris slides and debris flows.

217. NMFS found the duration of elevated landslide risk is influenced by the time to establish new vegetative growth and associated root strength. Root strength may vary by species, age, and density. Many "pioneer" species—that is, species that are the first to re-establish post high-severity fire—provide root strength and help to stabilize soils.

218. Natural regeneration is occurring in the Westside Project action area, including in areas that burned at moderate- to high-severity.

219. NMFS found that post-fire logging may slow natural forest regeneration through injuring or removing naturally regenerated seedlings or root collar sprouts, compacting soils, reducing organic matter and soil moisture, increasing temperature from loss of shading, and other processes.

220. NMFS admits natural regeneration may be slowed in the Westside Project due to logging.

221. NMFS found that project activities such as site preparation, planting, release, and legacy sediment site treatment are all expected to reduce the long term duration of the elevated landslide risk from approximately 80 years down to 30–40 years.

222. In particular, site preparation, planting, and release would help reestablish trees and associated root strength.

223. These mitigating project features will only occur after post-fire logging has occurred.

224. Timber receipts are unlikely to support the costs associated with site preparation, planting, and release.

225. NMFS's analysis assumed full project implementation.

226. Receipts from the sale of timber will be insufficient to pay for site preparation, replanting, and release as proposed.

227. Legacy site treatment is also dependent on funding.

228. The Forest Service will need to seek money from alternative sources, including congressional appropriations, to pay for these project features.

229. Additional revenue is uncertain and speculative.

230. NMFS did not analyze the impact to the duration of landslide risk should site preparation, replanting, and release, or legacy site treatment not occur or is substantially delayed.

231. NMFS issued an ITS for the Westside Project that anticipates that the project will result in incidental take in the form of reduced survival rates of in-gravel SONCC coho in the Grider Creek and Walker Creek watersheds.

232. In the ITS, NMFS did not quantify incidental take of coho salmon that will result from the Westside Project.

233. Instead, NMFS used as a surrogate for take quantification the amount of generated fine sediment delivered to streams, as projected by the ERA model.

234. Term and Condition 2g in the ITS requires the Forest Service to reinitiate consultation only in the event that project activities increase fine sediment delivery above five percent (5%), a threshold that is wholly based on the ERA model.

235. Term and Condition 3a in the ITS states a need for further investigation of relationships between the ERA and other models and the sediment parameters applied as a surrogate for take quantification.

236. The ITS does not require the Forest Service to model the "Project ERA" in the future.

237. NMFS did not consider project effects on recovery of SONCC coho in the watersheds that will be adversely affected by the project.

238. The BiOp anticipates that adverse effects will persist for ten years, but will not reduce the value of critical habitat for recovery.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Failure to Account for Short-Term Effects to Listed Species and Reliance on Speculative Mitigation Measures

239. Plaintiffs reallege all preceding paragraphs.

240. Under Section 7 of the ESA, NMFS opined whether the Westside Project would jeopardize the continued existence of SONCC coho or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(4).

241. NMFS issued a no-jeopardy opinion for the Westside Project.

242. The no-jeopardy opinion is arbitrary and capricious because it fails to fully account for near-term effects of the Westside Project on SONCC coho.

243. The no-jeopardy opinion is arbitrary and capricious, because it is based on uncertain and speculative measures related to restored habitat for SONCC coho.

244. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to EAJA. 28 U.S.C. § 2412.

SECOND CLAIM FOR RELIEF

Failure to Assess Project Effects on Recovery of Listed Species

245. Plaintiffs reallege all preceding paragraphs.

246. Under Section 7 of the ESA, NMFS opined whether the Westside Project would jeopardize the continued existence of SONCC coho or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(4).

247. NMFS issued a no-jeopardy opinion for the Westside Project.

248. The no-jeopardy opinion is arbitrary and capricious because NMFS arbitrarily determined that the Westside Project is not likely to adversely affect SONCC coho critical habitat and reduce its value for the recovery of the SONCC coho ESU.

249. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to EAJA. 28 U.S.C. § 2412.

THIRD CLAIM FOR RELIEF

Failure to Utilize an Appropriate Incidental Take Metric

250. Plaintiffs reallege all preceding paragraphs.

251. Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(b)(4), and its implementing regulations, 50 CF.R. 402.14(i), contain requirements for ITSs.

252. An ITS must specify the amount or extent of incidental take. It is preferred to compute take by number of individual members of the affected listed species.

253. If a surrogate is used instead, it must perform the same functions as a numeric standard: to define the extent of permissible take, and set a standard to trigger the requirement to reinitiate consultation.

254. The ITS for the Westside Project illegally fails to quantify take based on SONCC coho.

255. The ITS for the Westside Project adopts a surrogate measure of take based on the ERA model.

256. The ITS is arbitrary and capricious because NMFS failed to demonstrate that the use of the ERA model is reasonable given its flaws.

257. The ITS is arbitrary and capricious because it has no demonstrated relationship to avoiding jeopardy.

258. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to EAJA. 28 U.S.C. § 2412.

FOURTH CLAIM FOR RELIEF

Failure to Analyze Project's Contribution to Species Recovery

259. Plaintiffs reallege all preceding paragraphs.

260. Section 7 requires NMFS to "utilize [its] authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1).

261. The BiOp illegally fails to discuss, analyze, or determine how the Westside Project will affect the recovery of, or recover, SONCC coho.

262. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to EAJA. 28 U.S.C. § 2412.

FIFTH CLAIM FOR RELIEF

The Authorization of Large Snag Removal from the Seiad and Eddy Gulch LSRs Violates NFMA

263. Plaintiffs incorporate by reference all preceding paragraphs.

264. NFMA requires the Forest Service to design and implement projects that are consistent with the applicable LRMP. 16 U.S.C. §§ 1604(i); 36 C.F.R. § 219.10(e).

265. The Northwest Forest Plan, which amended the Klamath LRMP, permits logging in LSRs, but restricts the timing, location, type, and amount of salvage logging that may occur.

266. First, the NFP requires salvage logging within LSRs to be consistent with LSR Objectives.

267. An important LSR Objective is "development of old-growth forest characteristics including snags."

268. Snags are standing dead trees.

269. The Westside Project will remove snags, critical old-growth forest features, from the planning area.

270. Second, the NFP states that within LSRs, "while priority should be given to salvage in areas where it will have a positive effect on late-successional forest habitat, salvage operations should not diminish habitat suitability now or in the future."

271. The Westside Project permits the removal of large diameter snags, which the FEIS recognizes are critical components of late-successional habitat. KS Wild Scoping Comments, 3.

272. The FEIS recognizes that spotted owls – a late-successional-associated species – depend on large diameter snags for survival, and that their numbers and habitat will decline under the selected alternative.

273. The FEIS also recognizes that logging will degrade habitat for bald eagles - another late-successional-associated species - by removing potential future nest trees in the Caroline Creek eagle area, creating a "high risk" that these eagles will not find future nest trees.

274. The FEIS states that habitat quality for other late-successional-associated species will decline as a result of project implementation.

275. Third, the NFP states that following stand replacing events such as wildfire, the Forest Service must "focus on retaining snags that are likely to persist until late-successional conditions have developed and the new stand is again producing large snags."

276. Scientific literature indicates that snags greater than 16" dbh are likely to persist on the landscape until the new forest is again producing snags, in about 80 years. The average diameter of snags to be logged from the Westside project is 16" dbh.

277. Finally, the NFP states that in LSRs, "salvage will not be driven by economic...factors."

278. However, a principle purpose and need of the Westside Project is an "economically viable project" that benefits local communities.

279. The removal of large diameter, economically valuable snags from the Seiad and Eddy Gulch LSRs "diminishes habitat suitability now or in the future," is inconsistent with the LSR Objective of developing of snags, and does not "focus on retaining snags likely to persist until the next stand develops." Consequently, the Westside Project is in contravention to the

requirements of the NFP and Klamath LRMP. The decision to implement the Westside Project is arbitrary, capricious, and not in accordance with NFMA. 5 U.S.C. § 706(2)(A).

280. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to EAJA. 28 U.S.C. § 2412.

SIXTH CLAIM FOR RELIEF

Logging in Riparian Reserves Violates NFMA

281. Plaintiffs incorporate by reference all preceding paragraphs.

282. NFMA requires the Forest Service to design and implement projects that are consistent with the applicable LRMP. 16 U.S.C. §§ 1604(i); 36 C.F.R. § 219.10(e).

283. The Northwest Forest Plan and the Klamath LRMP require the Forest Service to designate "unstable and potentially unstable" slopes as Riparian Reserves; Defendants have termed these areas "geologic riparian reserves."

284. The NFP and KNF LRMP require the Forest Service to designate Riparian Reserves and "Prohibit[s] timber harvest, including fuelwood cutting, in Riparian Reserves, except...where catastrophic events such as fire, flooding, volcanic, wind, or insect damage result in degraded riparian conditions, allow salvage and fuelwood cutting <u>if required to attain Aquatic Conservation Strategy objectives</u>."

285. The Westside Project will log 2,000 out of 3,900 acres on steep and unstable lands considered to be Geological Riparian Reserves, in violation of the NFP and KNF LRMP.

286. The Westside Project FEIS and ROD do not demonstrate that post-fire logging within Geologic Riparian Reserves is "<u>required</u> to attain Aquatic Conservation Strategy Objectives."

287. Because the Forest Service has failed to demonstrate that post-fire logging within Riparian Reserves is required to attain Aquatic Conservation Strategy Objectives, the decision to implement the Westside Project is arbitrary, capricious, and not in accordance with NFMA. 5 U.S.C. § 706(2)(A).

288. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to EAJA. 28 U.S.C. § 2412.

SEVENTH CLAIM FOR RELIEF

Failure to Comply with Klamath National Forest LRMP Requirements for the Protection of the Soil Resource Violates NFMA

289. Plaintiffs incorporate by reference all preceding paragraphs.

290. NFMA requires the Forest Service to design and implement projects that are consistent with the applicable LRMP. 16 U.S.C. § 1604(i).

291. The Klamath LRMP states requires the Forest Service to "plan and implement land management activities to maintain or enhance soil productivity and stability."

292. Specifically, the KNF LRMP requires the Forest Service to:

a. Plan and implement land management activities to maintain or enhance soil productivity and stability;

b. Maintain soil cover of 70% or 80% (depending upon slope and soil type) on tractor units; maintain soil cover of 50% to 80% on prescribed burn units, depending upon slope and soil type;

c. Maintain soil productivity by retaining organic material on the soil surface and by retaining organic material in the soil profile; and

d. Maintain a minimum of 85% of the existing soil organic matter in the top 12 inches of the soil profile to allow for nutrient cycling and maintain soil productivity.

293. The Forest Service acknowledges that the Westside Project "does not meet" these requirements on thousands of acres of the project area.

294. The Westside Project does not meet LRMP requirements for the protection of the soil resource as required by NFMA, and thus is arbitrary, capricious, and not in accordance with NFMA, in violation of the APA. 5 U.S.C. § 706(2)(A).

295. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to EAJA. 28 U.S.C. § 2412.

EIGHTH CLAIM FOR RELIEF

Failure to Comply with Klamath National Forest LRMP's Requirements for the Protection of Bald Eagle Habitat Violates NFMA

296. Plaintiffs incorporate by reference all preceding paragraphs.

297. NFMA requires the Forest Service to design and implement projects that are consistent with the applicable LRMP. 16 U.S.C. § 1604(i).

298. The Klamath LRMP permits timber salvage only "if it benefits eagle habitat."

299. The FEIS did not make a finding that the Westside Project will "benefit eagle habitat" and instead concluded that the Project will result in a "high risk" that the Caroline Creek bald eagle pair will not be able to find a future nest tree, thus degrading eagle habitat.

300. The Klamath LRMP requires approval by the U.S. Fish and Wildlife Service prior to any vegetation management in eagle habitat.

301. The Klamath National Forest did not receive approval from the U.S. Fish and Wildlife Service for bald eagles for the Westside Project.

302. The Westside Project does not meet LRMP requirements for the protection of the bald eagle habitat as required by NFMA, and thus is arbitrary, capricious, and not in accordance with NFMA, in violation of the APA. 5 U.S.C. § 706(2)(A).

Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to EAJA. 28 U.S.C. § 2412.

PRAYER FOR RELIEF

Based upon the foregoing, Plaintiffs respectfully request that the Court:

1. Declare that NMFS' BiOp and ITS violate the ESA;

2. Set aside NMFS' BiOp and ITS under the APA;

3. Enjoin the Westside Project pending completion of any reinitiation of consultation on the project;

4. Declare that the Forest Service violated the National Forest Management Act, the Administrative Procedure Act, and their implementing regulations in designing, analyzing, and implementing the Westside Fire Recovery Project final environmental impact statement (FEIS) and record of decision (ROD);

5. Declare that the Forest Service violated the Northwest Forest Plan and Klamath National Forest Land and Resource Management Plan in designing and implementing the Westside Fire Recovery Project FEIS and ROD;

6. Vacate the Westside Fire Recovery Project FEIS and ROD until such time as the agency demonstrates to this court that it has adequately complied with the law;

7. Enjoin the Forest Service and its agents from proceeding with the Westside Fire Recovery Project, or any portion thereof, unless and until the violations of federal law set forth herein have been corrected to the satisfaction of this court;

8. Award Plaintiffs their costs of litigation, including reasonable attorney fees under the Equal Access to Justice Act. 28 U.S.C. § 2412.; and

9. Grant Plaintiffs such other and further relief as the Court deems just and equitable.

Date: March 15, 2016.

Respectfully submitted,

/s/ Tom Wheeler
Tom Wheeler (CA Bar #304191)
Environmental Protection Information Center
145 G Street #A
Arcata, California 95521
tom@wildcalifornia.org
Ph: (707) 822-7711
Fax: (707) 822-7712

Counsel for Plaintiff Environmental Protection Information Center

Susan Jane M. Brown, applicant, *pro hac vice*
Western Environmental Law Center
4107 N.E. Couch St.
Portland, Oregon 97232
brown@westernlaw.org
Ph.: (503) 914-1323
Fax: (541) 485-2457

Peter M.K. Frost, applicant, *pro hac vice*
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401
frost@westernlaw.org
Ph: (541) 359-3238
Fax: (541) 485-2457

Counsel for Plaintiff Karuk Tribe, Klamath Riverkeeper, Klamath-Siskiyou Wildlands Center, Center Biological Diversity