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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FOREST SERVICE EMPLOYEES)
FOR ENVIRONMENTAL ETHICS,))
)
Plaintiff,)
)
vs.)
)
UNITED STATES FOREST)
SERVICE, an agency of the U.S.)
Department of Agriculture,)
)
Defendant.)
_____)

Civil No: 05-02220-SI

PLAINTIFF'S AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF
[ADMINISTRATIVE PROCEDURE ACT CASE]

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief. Defendant United States Forest Service (hereafter “Forest Service”) has failed to disclose in an environmental assessment or environmental impact statement the harm to the threatened northern spotted owl that will result from logging 57.31 acres of spotted owl critical habitat as a part of the Sims Fire Salvage Project (“Sims Project”), located on the Lower Trinity Ranger District, Six Rivers National Forest, in Humboldt County. In addition, the Forest Service has failed to stay implementation of the Sims Project for 45 days, in violation of the Forest Service Decisionmaking and Appeals Reform Act, 16 U.S.C. § 1612 (note), effectively denying Plaintiff of its right to pursue an administrative appeal of the Sims Project. Finally, the Forest Service has failed to consult with the U.S. Fish and Wildlife Service regarding the effects the Sims Project will have on the threatened northern spotted owl and its critical habitat, in violation of the Endangered Species Act, 16 U.S.C. § 1531, et seq.

2. Plaintiff seeks a declaratory judgment and injunctive relief to remedy the violations complained of herein. Plaintiff also seeks an award of costs, including attorney and expert witness fees. See Equal Access to Justice Act, 28 U.S.C. § 2412(d) and Endangered Species Act (ESA), 16 U.S.C. § 1540(g)(4).

JURISDICTION

3. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 and 28 U.S.C. § 1346, because this action involves the United States as a defendant, and it arises under the laws of the United States and the Administrative Procedure Act, (“APA”), 5 U.S.C. §§ 701, et seq. An actual, justiciable controversy exists between Plaintiff and Defendant. The requested relief is

proper under 28 U.S.C. § 2202 and 5 U.S.C. §§ 705 & 706.

VENUE

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(3)(A). The challenged action is located in Humboldt County, California. The Forest Service official who decided to sell and log spotted owl critical habitat is located in Arcata, California. Plaintiff has members who reside in this District, and who have been and will be injured by the Forest Service's actions and failures to act complained of herein.

5. This case is properly filed in the San Francisco Division pursuant to Local Rule 3-2(d). The challenged action is located in Humboldt County, California. The Forest Service official who decided to sell and log spotted owl critical habitat is located in Arcata, California. Plaintiff has members who reside in this District, and who have been and will be injured by the Forest Service's actions and failures to act complained of herein.

PARTIES

6. Plaintiff Forest Service Employees for Environmental Ethics (FSEEE) is a nonprofit organization, with its principal place of business in Eugene, Oregon. FSEEE is comprised of thousands of concerned citizens, present, former and retired Forest Service employees, and other resource managers. FSEEE's mission is to forge a socially responsible value system for the Forest Service based on a land ethic that ensures ecologically and economically sustainable resource management. FSEEE members hold the Forest Service accountable for responsible and legal land stewardship.

7. FSEEE includes members who are bird watchers who use and enjoy the national forest lands to be logged by the Sims Fire Salvage Project and enjoy viewing the spotted owls

who inhabit the area. These members recreational interests will be adversely affected and irreparably injured if the Forest Service continues to act and fails to act as alleged herein. These are actual, concrete injuries caused by the Forest Service's failure to comply with mandatory duties under the National Environmental Policy Act and the APA. The injuries would be redressed by the relief sought.

8. Plaintiff has exhausted any available administrative remedies. Reviewable final agency action exists and is subject to this Court's review under 5 U.S.C. §§ 702, 704, and 706.

9. Plaintiff sent the Forest Service a 60-day Notice of Intent to Sue under the ESA, and the Forest Service was in receipt of Plaintiff's 60-day Notice of Intent to Sue under the ESA on May, 27, 2005.

10. Defendant Forest Service is an agency of the U.S. Department of Agriculture.

SUMMARY OF FACTS AND GENERAL ALLEGATIONS

11. During the late summer of 2004, the Sims Fire burned approximately 4,030 acres within the upper tributaries of the Lower South Fork Trinity and Grouse Creek watersheds. Among the acres burned is a portion of northern spotted owl Critical Habitat Unit CA-30, designated by the U.S. Fish and Wildlife Service. 57 Fed. Reg. 1796 (January 15, 1992). On or about January 7, 2005, the Forest Service proposed to log some of the timber burned by the Sims Fire.

12. On April 12, 2005, FSEEE submitted public comments on the Forest Service's proposal to log timber burned by the Sims Fire. On April 15, 2005, FSEEE supplemented its earlier comments with a scientific study that shows northern spotted owls use severely-burned forests. That study concluded: "The large-scale salvage of live and dead timber on adjacent

private ownerships within the fire boundary, given that spotted owls appear to be using moderately to heavily burned forests, may warrant a cautious approach to salvage on Federally administered lands within the fire boundary.” Some private land salvage logging within area burned by the Sims fire has already occurred.

13. On May 17, 2005, Six Rivers National Forest supervisor Jeff Walter decided to sell and log the Sims Fire Salvage Project. The Forest Service did not assess the environmental effects of the Sims Project in an environmental assessment or an environmental impact statement. Instead the Forest Service relied upon a regulation that allows salvage logging of 250 or fewer acres requiring no more than ½ mile of temporary road construction to be excluded from environmental analysis. However, logging can only be categorically excluded from environmental analysis if there are no extraordinary circumstances related to the proposed action, which include, inter alia, federally-listed threatened or endangered species or designated critical habitat. In determining whether extraordinary circumstances exist, the Forest Service must consider the degree of the potential effect of the logging on critical habitat and the federally-protected wildlife species.

14. To determine the degree of the potential effect of Sims Project logging on the northern spotted owl and its critical habitat, the Forest Service prepared a biological assessment (“BA”) on March 17, 2004. The BA concluded that there would be no effect on the spotted owl or its critical habitat from logging burned trees because the Sims Fire made the habitat “unsuitable” for spotted owl use. In reaching this conclusion, the Forest Service 1) failed to consider the best available scientific evidence on spotted owl use of recently-burned forests; 2) arbitrarily relied upon definitions of “suitable” spotted owl habitat based exclusively upon

studies of green forests, not recently-burned forests; and, 3) failed to consider the importance of dead trees to spotted owl prey species.

15. The Forest Service also failed to consider the effects Sims Project logging would have on the northern spotted owl's designated critical habitat. Critical habitat are the geographic areas designated by the U.S. Fish and Wildlife Service that include physical and biological features, referred to as the primary constituent elements, that support nesting, roosting, foraging, and dispersal functions essential to the conservation of the northern spotted owl. 57 Fed. Reg. 1796 ((January 15, 1992). Northern spotted owls use severely-burned forests for roosting, foraging, and dispersal. The Forest Service failed to consider use by spotted owls of severely-burned forests in concluding that the Sims logging would have no effect upon critical habitat.

16. The Forest Service did not consult with the U.S. Fish and Wildlife regarding the effects the Sims Project would have on the northern spotted owl or its critical habitat.

CLAIMS FOR RELIEF

Claim 1

Violation of National Environmental Policy Act

The Forest Service Failed to Disclose in an Environmental Assessment or Environmental Impact Statement the Environmental Effects that Logging the Sims Project will have on the northern spotted owl or its critical habitat.

17. Plaintiff hereby incorporates by reference all preceding paragraphs.

18. The National Environmental Policy Act (NEPA) and its implementing regulations, 40 C.F.R. §§ 1501.3 and 1508.9, require federal agencies to analyze the foreseeable environmental impacts, including direct, indirect, and cumulative impacts, of "major federal

actions,” 42 U.S.C. § 4332(c)(i), in an environmental impact statement. Federal agencies may prepare an environmental assessment to determine whether an environmental impact statement is necessary. 40 C.F.R. § 1501.3. Only if a proposed action falls within a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by an agency can an environmental assessment or environmental impact statement not be prepared.

19. The Forest Service failed to consider the best available scientific evidence on spotted owl use of recently-burned forests; arbitrarily relied upon definitions of “suitable” spotted owl habitat based exclusively upon studies of green forests, not recently-burned forests; and, failed to consider the importance of dead trees to spotted owl prey species when it assessed the degree of the potential effect of Sims Project logging on the northern spotted owl and its critical habitat. These failures violate the Forest Service’s categorical exclusion regulations, Forest Service Handbook 1909.15 (Chapter 30), the National Environmental Policy Act, 42 U.S.C. § 4332 et seq., and NEPA’s implementing regulations, 40 C.F.R. § 1500 et seq.

20. The Forest Service’s failures listed in the preceding paragraph are arbitrary and capricious, an abuse of discretion, and contrary to law and to procedures required by law. 5 U.S.C. § 706(2)(A), (D).

Claim 2

Violation of Endangered Species Act

The Forest Service Failed to Consult with the U.S. Fish and Wildlife Service Regarding the Effects the Sims Project Would Have on the Threatened Northern Spotted Owl and its Critical Habitat

21. Plaintiff hereby incorporates by reference all preceding paragraphs.

22. The Endangered Species Act and its implementing regulations, 50 CFR Part 402, require federal agencies to assess the effects its actions will have on threatened or endangered species. In making its biological assessment the agency must use the best scientific and commercial data available. 16 U.S.C. § 1540(a)(2). If an action is determined likely to adversely affect a threatened or endangered species or adversely modify its critical habitat, the agency must consult with the U.S. Fish and Wildlife Service and obtain its biological opinion regarding the action.

23. The Forest Service failed to utilize the best scientific and commercial data available when it 1) failed to consider the best available scientific evidence on spotted owl use of recently-burned forests; 2) arbitrarily relied upon definitions of “suitable” spotted owl habitat based exclusively upon studies of green forests, not recently-burned forests; and, 3) failed to consider the importance of dead trees to spotted owl prey species; and therefore failed to consult with the U.S. Fish and Wildlife Service and obtain its biological opinion regarding the action.

24. The Forest Service’s failures listed in the preceding paragraph are arbitrary and capricious, an abuse of discretion, and contrary to law and to procedures required by law. 5 U.S.C. § 706(2)(A), (D).

Claim 3

Violation of Forest Service Decisionmaking and Appeals Reform Act

The Forest Service Failed to Provide for Administrative Review of the Sims Project

25. Plaintiff hereby incorporates by reference all preceding paragraphs.

26. The Forest Service Decisionmaking and Appeals Reform Act, 16 U.S.C. § 1612 note, requires Defendant to publish notice of proposed projects implementing land and resource

management plans in a newspaper of general circulation, accept public comment on the proposed decision, and provide for administrative review by those who commented. The Sims project implements the Six Rivers National Forest land and resource management plan.

27. FSEEE commented upon the Sims Project. The Forest Service failed to provide for any administrative review of the Sims Project. Defendant's failure to provide for administrative review violates the FSDARA, 16 U.S.C. § 1612 note (subsection (b)(2)), and is arbitrary, capricious, and not in accordance with procedures required by law, in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) and (D). To the extent Defendant's administrative appeal regulations, 36 CFR Part 215, provide otherwise for projects deemed categorically exempt from review under NEPA, these regulations are ultra vires. Defendant's failure to stay implementation of the Sims Project during the period allowed for administrative appeals violates the FSDARA, 16 U.S.C. § 1612 note (subsection (e)), and is arbitrary, capricious, and short of statutory right, in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) and (C).

RELIEF REQUESTED

WHEREFORE, the Plaintiff respectfully requests that this Court:

A. Declare that the Forest Service's failure to consider the use by northern spotted owls of severely-burned forests violates the Forest Service's categorical exclusion regulations, Forest Service Handbook 1909.15 (Chapter 30), the National Environmental Policy Act, 42 U.S.C. § 4332 et seq., its implementing regulations, 40 C.F.R. § 1500 et seq., and the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), (D).

B. Declare that the Forest Service's failure to use the best available scientific and

commercial data to determine whether the Sims Project is likely to adversely affect the northern spotted owl or modify its critical habitat violates the Endangered Species Act, 16 U.S.C. § 1531, et seq., and its implementing regulations, 50 CFR Part 402, and the Administrative Procedures Act, 5 U.S.C. § 706 et seq.

C. Declare that the Forest Service's failure to stay implementation of the Sims Project during the administrative review period violates the Forest Service Decisionmaking and Appeals Reform Act, 16 U.S.C. § 1612 (note), and that is regulations exempting categorically excluded actions from notice, comment, and administrative appeal are ultra vires.

D. Grant Plaintiff injunctive relief to compel the Forest Service to comply with the law, prevent irreparable harm, and satisfy the public interest;

E. Award to Plaintiff its costs, expenses, expert witness fees, and reasonable attorney fees under applicable law; and

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

DATED this 28th day of July, 2005.

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ROSSBACH HART BECHTOLD, PC

Donald Mooney (CA Bar #153721)
THE LAW OFFICE OF DONALD MOONEY

By: s/ Timothy M. Bechtold
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