

1 Matt Kenna (CO Bar No. 22159)
2 Public Interest Conservation Law
3 679 E. 2nd Ave., Suite 11B
4 Durango, CO 81301
5 Phone: (970) 385-6941
6 Fax: (970) 692-2570
7 Email: matt@kenna.net
8 Applicant *Pro Hac Vice*

9 Jan Chatten-Brown (Bar No. 50275)
10 Douglas P. Carstens (Bar No. 193439)
11 Chatten-Brown & Carstens
12 2601 Ocean Park Blvd. Suite 205
13 Santa Monica, CA 90405
14 Phone: (310) 314 - 8040
15 Fax: (310) 314 - 8050
16 Email: jcb@cbcearthlaw.com
17 dpc@cbcearthlaw.com

18 Attorneys for Plaintiffs

19 IN THE UNITED STATES DISTRICT COURT
20 FOR THE CENTRAL DISTRICT OF CALIFORNIA

21 LOS PADRES FORESTWATCH, and
22 CALIFORNIA CHAPARRAL
23 INSTITUTE,
24 Plaintiffs,
25 v.
26 UNITED STATES FOREST
27 SERVICE,
28 Defendant.

Case No.
**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

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3 1. This is a challenge to two of the public notice, comment, and
4 administrative appeal regulations that the agency promulgated to
5 implement the Appeals Reform Act of 1992, Pub. L. 102-381, Title III, §
6 322, 106 Stat. 1419 (Oct. 5, 1992) (“ARA”), as applied in the Tepusquet
7 Fuels Treatment Project approved by the United States Forest Service.
8 The challenged regulations are codified at 36 C.F.R. §§ 215.4(a) and
9 215.12(f) (2003). The ARA requires that all “proposed actions of the
10 Forest Service concerning projects and activities implementing land and
11 resource management plans” must be subject to public notice, comment,
12 and administrative appeal, yet the challenged regulations illegally
13 exempt some such proposed actions from notice, comment and appeal,
14 including the Tepusquet project. *See* ARA § (a). In fact, the Ninth
15 Circuit has already ruled that these regulations violate the ARA. *Earth*
16 *Island Inst. v. Ruthenbeck*, 490 F.3d 687 (9th Cir 2007), *rev’d on other*
17 *grounds sub nom. Summers v. Earth Island Inst.*, 129 S. Ct. 1142
18 (2009). For these reasons, the Court should set aside the regulations,
19 and order the Forest Service to subject the Tepusquet project to public
20 notice, comment and appeal.
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1 2. The plaintiffs support appropriate fuels treatment projects to
2 avoid catastrophic wildfire, and believe that portions of the Tepusquet
3 project are appropriate. However, plaintiffs disagree with certain
4 aspects of the project that are far removed from the wildland-urban
5 interface and which extend several miles into the remote Los Padres
6 National Forest backcountry. Plaintiffs' specific concerns include the
7 construction of several miles of remote fuel breaks using heavy
8 machinery, excessive vegetation clearance along backcountry roads, and
9 the cumulative impacts associated with this project when combined
10 with another pre-existing prescribed burn project and two human-
11 caused wildfires that collectively burned more than 330,000 acres of
12 chaparral immediately adjacent to the Tepusquet project. If plaintiffs
13 had been permitted to comment on the project, and to administratively
14 appeal it if necessary, they could have convinced the Forest Service to
15 change the project's inappropriate components.
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22 **JURISDICTION & VENUE**

23 3. This Court has jurisdiction over this action pursuant to 28
24 U.S.C. § 1331.
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26 4. Venue is proper pursuant to 28 U.S.C. § 1391(e).
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1 **PARTIES**

2 5. Plaintiff Los Padres ForestWatch is a local, independent
3 nonprofit conservation organization with more than 800 members,
4 headquartered in Santa Barbara, California. ForestWatch's mission is
5 to protect wildlife habitat, wilderness landscapes, and outdoor
6 recreational opportunities in the Los Padres National Forest and other
7 public lands along California's Central Coast. ForestWatch has
8 members whose recreational, aesthetic, business and/or environmental
9 interests have been, are being, and will be, adversely affected by the
10 Forest Service's actions as set forth herein. Members of ForestWatch
11 use and enjoy the land on which the Tepusquet project is located for
12 outdoor recreation and scientific study of various kinds, including
13 nature study, photography, hiking, solitude, health and a variety of
14 other activities, and have plans to return. ForestWatch brings this
15 action on behalf of itself and its members.
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22 6. Plaintiff California Chaparral Institute is a nonprofit California
23 corporation of naturalists, scientists, wildland firefighters, and
24 educators working to promote the understanding of southern
25 California's chaparral ecosystems. The Institute encourages public
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1 awareness of chaparral and its relationship with fire, facilitates better
2 communication between the scientific and firefighting communities,
3 clarifies fire and land management regulations, and helps to develop
4 planning policies that will lower the risk of fire in the wildland/urban
5 interface without impacting wildland values. The Institute is supported
6 by over 300 members, some of whom have visited the Tepusquet area
7 and have plans to return. The Institute is concerned about the
8 ecological and fiscal impacts of projects, like the Tepusquet project, that
9 focus primarily on landscape-scale vegetation treatments that are far-
10 removed from communities at risk. The Institute promotes effective
11 strategies to reduce fire risk, and strongly supports the reduction of fuel
12 hazards in the wildland-urban interface using smaller strategic fuel
13 modifications directly around and near structures and communities.
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19 7. The challenged project harms plaintiffs' use of the land where
20 the Tepusquet project is located, because their members prefer to use
21 land that has been unaffected by the intensive management proposed
22 by the project. The challenged regulations harm the plaintiffs and their
23 members by denying them the opportunity to affect changes to the
24 Tepusquet and other projects in a manner that would eliminate or
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1 reduce the impacts of the projects to their use of the land. Success in
2 this suit would redress plaintiffs' injuries by giving them and their
3 members the opportunity to modify this and other Forest Service
4 projects through comment and appeal in a manner that would lessen
5 harm to their interests in using the land subject to the Tepusquet and
6 other projects.
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10 8. The defendant United States Forest Service is an agency within
11 the United States Department of Agriculture, and promulgated the
12 challenged regulations and approved the challenged Tepusquet project.
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14 **FACTS**

15 9. Before 1992, the United States Forest Service for decades had
16 regulations providing for public comment and appeal of decisions
17 concerning projects and activities such as timber sales, fuels
18 treatments, road and facility construction, range management and
19 improvements, wildlife and fisheries habitat improvement measures,
20 forest pest management activities, removal of certain minerals or
21 mineral materials, land exchanges and acquisitions, and establishment
22 or expansion of winter sports or other special recreation sites. 36 C.F.R.
23 § 217.3(b) (1992). The Forest Service would officially memorialize its
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1 approval of these projects in “decision documents.” Minor actions such
2 as routine building maintenance and individual Christmas tree cutting
3 permits could be approved without “decision documents” and were not
4 subject to appeal. Id. § 217.3(a)(1). However, documented decisions
5 were appealable, regardless of whether they were subject to the
6 requirement of an “environmental analysis” (EA) or “environmental
7 impact statement” (EIS) under the National Environmental Policy Act,
8 42 U.S.C. 4321 et seq. (NEPA). See 57 Fed. Reg. 43,180, 43,208-10
9 (Sept. 18, 1992) (listing decisions excluded from NEPA review that
10 required a decision document and minor activities that did not).

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15 10. In 1992, the Forest Service proposed eliminating
16 administrative appeal of project-level decisions. 57 Fed. Reg. 10,444
17 (Mar. 26, 1992). The proposal was widely opposed, and Congress
18 responded by enacting the Forest Service Decisionmaking and Appeals
19 Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16
20 U.S.C. 1612 note), which provides:

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23 (a) In general.—In accordance with this section, the Secretary of
24 Agriculture, acting through the Chief of the Forest Service, shall
25 establish a notice and comment process for proposed actions of the
26 Forest Service concerning projects and activities implementing
27 land and resource management plans developed under the Forest
28 and Rangeland Renewable Resources Planning Act of 1974 (16

1 U.S.C. 1601 et seq.) and shall modify the procedure for appeals of
2 decisions concerning such projects.

3 (b) Notice and Comment.—

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5 (1) Notice.—Prior to proposing an action referred to in
6 subsection (a), the Secretary shall give notice of the proposed
7 action, and the availability of the action for public comment
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9 (2) Comment.—The Secretary shall accept comments on the
10 proposed action within 30 days after publication of the notice
11 in accordance with paragraph (1).

12 (c) Right to appeal.—Not later than 45 days after the date of
13 issuance of a decision of the Forest Service concerning actions
14 referred to in subsection (a), a person who was involved in the
15 public comment process under subsection (b) through submission
16 of written or oral comments or by otherwise notifying the Forest
17 Service of their interest in the proposed action may file an appeal.

18 ARA § 322. Congress's rejection of the Forest Service's attempt to
19 eliminate appeals and its establishment of statutory notice, comment,
20 and appeal requirements reflected its intent to "allow for continued
21 citizens' rights to participate in, and appeal decisions of, the Forest
22 Service while providing for more timely consideration of such appeals."
23 138 Cong. Rec. H9870-02 (Sept. 30, 1992) (Conference Report).

24 11. Nonetheless, when the Forest Service promulgated its first
25 ARA regulations in 1993, it provided that all decisions "categorically
26 excluded" from analysis in an EA or EIS were exempt from comment
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1 and appeal under the ARA, except for timber sale decisions. Because
2 those regulations unlawfully excluded from ARA procedures decisions
3 “concerning projects and activities implementing land and resource
4 management plans,” ARA § 322(a), they were challenged in federal
5 court, resulting in a consent judgment. *Heartwood v. U.S. Forest Serv.*,
6 Civ. No. 99-4255 (S.D. Ill.) (Sept. 15, 2000). The consent judgment
7 required the Forest Service to make ten categories of categorically
8 excluded actions in addition to timber sales (such as controlled burns
9 for fuel treatment, mineral exploration and development of motorized
10 recreation trails) subject to comment and appeal under interim rules,
11 and the Forest Service did so. 65 Fed. Reg. 61,302 (Oct. 17, 2000). The
12 consent judgment contemplated that the Forest Service would issue
13 new permanent ARA regulations, but it did not govern their substance.
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19 *Id.*

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21 12. The Forest Service finalized its permanent regulations,
22 including the rules at issue here, in June 2003. 68 Fed. Reg. 33,582
23 (June 4, 2003). Under the new rules, the Forest Service expanded the
24 exemption from ARA notice, comment and appeal procedures to cover
25 *all* decisions categorically excluded from NEPA analysis. 36 C.F.R. §
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1 215.4(a), 215.12(f) (2003). The exempted actions included timber sales
2 up to 250 acres, forest-thinning up to 1,000 acres, and prescribed burns
3 up to 4,500 acres. See 68 Fed. Reg. 44,598, 44,607 (July 29, 2003); 67
4 Fed. Reg. 77,038, 77,039 (Dec. 16, 2002). The Forest Service
5 implemented the rules immediately and began carrying out projects
6 without affording comment and appeal rights to the public, including
7 the plaintiffs here.
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11 13. The rules were successfully challenged in the Eastern District
12 of California in 2003, and the Ninth Circuit later upheld the district
13 court's judgment that the rules violated the ARA, finding: "The Forest
14 Service, to comply with the ARA, must promulgate regulations that
15 preserve administrative appeals for any decisions subject to
16 administrative appeal before the proposed changes in 1992. Had
17 Congress wanted to categorically eliminate the right of appeal for
18 timber sales and other categorically excluded Forest Service actions, the
19 ARA would not have been necessary." *Earth Island Inst. v. Ruthenbeck*,
20 *supra*, 490 F.3d at 698. However, on March 3, 2009, the United States
21 Supreme Court reversed the Ninth Circuit on standing, not addressing
22 the merits of the legality of the regulations, allowing them to spring
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1 back to life after being enjoined for 3 ½ years. *Summers v. Earth Island*
2 *Inst.*, 129 S. Ct. 1142 (2009).

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4 14. The Forest Service has begun utilizing the previously-enjoined
5 regulation again. On August 10, 2009, the agency approved the
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7 Tepusquet Fuels Treatment Project, which “approve[s] the treatment of
8 hazardous fuels on 19,300 acres in the area east of the community of
9 Santa Maria in Santa Barbara County, California This includes
10 11,522 acres of National Forest System (NFS) lands This
11 proposal also includes on-going maintenance of roads, trails, fuel breaks
12 and mechanical treatment areas used for this project. Prescribed
13 burning will be applied over the next ten to fifteen years. * * *
14 Treatment methods include chainsaw cutting, dozers, mechanical
15 treatments, and prescribed burning.” Decision Memo at 1-2. The
16 Forest Service simultaneously invoked two categorical exclusions to
17 exempt the project from an EA or EIS under NEPA, and further
18 exempted the project from public notice, comment and appeal pursuant
19 to the challenged regulations. *Id.* at 6, 12-13.
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25 15. The plaintiffs support appropriate fuels treatment projects,
26 and believe portions of the Tepusquet project are appropriate.
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1 However, plaintiffs disagree with certain aspects of the project that are
2 far removed from the wildland-urban interface and which extend
3 several miles into the remote Los Padres National Forest backcountry.
4 Plaintiffs' specific concerns include the construction of several miles of
5 remote fuel breaks using heavy machinery, excessive vegetation
6 clearance along roads, and the cumulative impacts associated with this
7 project when combined with another pre-existing prescribed burn
8 project and two human-caused wildfires that collectively burned more
9 than 330,000 acres of chaparral immediately adjacent to the Tepusquet
10 project. Plaintiffs further believe the project was improperly exempted
11 from the need to prepare an EA or EIS under NEPA pursuant to the
12 claimed categorical exclusions, which they believe do not apply. If
13 plaintiffs had been permitted to comment on the project, and to
14 administratively appeal it, plaintiffs could have convinced the Forest
15 Service to prepare an EA or EIS rather than to categorically exclude the
16 project, which along with plaintiffs' substantive comments could have
17 convinced the Forest Service to change the proposed project to eliminate
18 its inappropriate components.
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1 **CLAIM FOR RELIEF**

2 16. The above paragraphs are incorporated here by reference.

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4 17. The Forest Service has violated ARA sections 322(a) and 322(c)
5 by issuing regulations codified at 36 C.F.R. §§ 215.4(a) and 215.12(f)
6 (2003), which exempt all decisions that are categorically excluded from
7 NEPA analysis but which implement forest plans and are approved
8 with "decision documents," from public notice, comment, and appeal. It
9 has further violated the ARA by approving the Tepusquet Fuels
10 Treatment Project without subjecting it to public notice, comment and
11 appeal pursuant to those regulations. By doing so, the defendant has
12 taken final agency actions that are arbitrary, capricious, and not in
13 accordance with law, and which should be set aside under the judicial
14 review provision of the APA, 5 U.S.C. § 702 *et seq.*

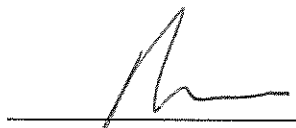
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19 **REQUEST FOR RELIEF**

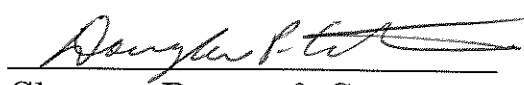
20 For these reasons, plaintiffs request that the Court:

- 21 a) Declare that the Forest Service violated the ARA by issuing public
22 notice, comment, and administrative appeal regulations that are
23 arbitrary, capricious, and not in accordance with law, and by approving
24 the Tepusquet Fuels Treatment Project pursuant to those regulations;

- 1 b) Set aside the challenged regulations and the Decision Memo for
2 the Tepusquet Fuels Treatment Project, with any injunctive relief
3 tailored to permit necessary and proper wild-urban interface fire
4 mitigation to go forward while the Project is subjected to public notice,
5 comment and appeal under the ARA;
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8 c) Award plaintiffs their costs and attorneys' fees under the Equal
9 Access to Justice Act, 28 U.S.C. § 2412; and
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11 d) Provide such other relief as the Court deems just and proper.

12 Respectfully submitted December 14, 2009

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16 _____
17 Matt Kenna, Attorney
18 Applicant *Pro Hac Vice*

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20 _____
21 Chatten-Brown & Carstens
22 Jan Chatten-Brown
23 Douglas P. Carstens

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28 Attorneys for Plaintiffs