Margaret Hall (Bar No. 293699)
Email: mhall@environmentaldefensecenter.org
Alicia Roessler (Bar No. 219623)
Email: aroessler@environmentaldefensecenter.org
Environmental Defense Center
906 Garden Street
Santa Barbara, California 93101
Telephone: (805) 963-1622
Attorneys for Plaintiffs Los Padres ForestWatch, Keep Sespe Wild, American Alpine Club, and Earth Island Institute

Justin Augustine (Bar No. 235561)
Email: jaugustine@biologicaldiversity.org
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Telephone: (916) 597-6189
Attorney for Plaintiffs Center for Biological Diversity, Patagonia Works, and California Chaparral Institute

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

LOS PADRES FORESTWATCH, et al.,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE, et al.,

Federal Defendants.

COUNTY OF VENTURA,

Plaintiff,

Case No.: 2:22-cv-02781-JFW-SK
[Consolidated with Case Nos. 2:22-cv-02800-JFW-SK and 2:22-cv-02802-JFW-SK]

PLAINTIFFS LOS PADRES FORESTWATCH, ET AL.'S NOTICE OF MOTION; MOTION FOR SUMMARY JUDGMENT; AND MEMORANDUM IN SUPPORT THEREOF

Hon. John F. Walter

Hearing: June 26, 2023, 1:30pm
Place: Courtroom 7A
350 West 1st Street, Los Angeles

v.

UNITED STATES FOREST SERVICE, et al.,

Federal Defendants.

CITY OF OJAI,

Plaintiff,

v.

UNITED STATES FOREST SERVICE, et al.,

Federal Defendants.

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on June 26, 2023, at 1:30 p.m., or as soon thereafter as it may be heard, Plaintiffs Los Padres ForestWatch, Keep Sespe Wild Committee, Earth Island Institute, American Alpine Club, Center for Biological Diversity, Patagonia Works, and California Chaparral Institute (Case No. 2:22-cv-02781-JFW-SK), as well as the plaintiffs in the Consolidated Cases County of Ventura (Case No. 2:22-cv-02802-JFW-SK) and City of Ojai (Case No. 2:22-cv-02800-JFW-SK) (collectively, "Plaintiffs"), by and through their undersigned counsel, will, and hereby do, jointly move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, Civil Local Rule 56-1, and Orders of this Court, Doc Nos. 85 and 89. This Motion will be made before the Honorable John F. Walter, United States District Judge, First Street Courthouse, 350 West 1st Street, Courtroom 7A, Los Angeles, California.

Plaintiffs hereby move for summary judgment on the grounds that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law, based on the administrative record in this matter. In support of this Motion, Plaintiffs submit the accompanying Memorandum of Points and Authorities; Declarations; Supplemental Briefs from the County of Ventura and City of Ojai and their supporting papers; and a Proposed Judgment.

Respectfully submitted this 10th day of March, 2023,

/s/ *Margaret Hall*

/s/ *Alicia Roessler*

Attorneys for Plaintiffs Los Padres ForestWatch, Keep Sespe Wild, American Alpine Club, and Earth Island Institute

/s/ *Justin Augustine*

Attorney for Plaintiffs Center for Biological Diversity, Patagonia Works, and California Chaparral Institute

/s/ *David Edsall*

Attorney for Plaintiff County of Ventura

/s/ *Carmen Brock*

Attorney for Plaintiff City of Ojai

I, Justin Augustine, in accordance with Local Rule 5-4.3.4(a)(2)(i), attest that Maggie Hall, Alicia Roessler, Carmen Brock and David Edsall, drafted and/or reviewed the pleading presented here, concurred in the content, and authorized the filing of this document bearing their signature with the Court.

/s/ *Justin Augustine*

Attorney for Plaintiffs Center for Biological Diversity, Patagonia Works, and California Chaparral Institute

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TABLE OF ACRONYMS

Acronym	Definition
CE	Categorical Exclusion
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FSH	Forest Service Handbook
HFRA	Healthy Forests Restoration Act
IRA	Inventoried Roadless Area
NEPA	National Environmental Policy Act
FWS	U.S. Fish and Wildlife Service
WUI	Wildland Urban Interface

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs challenge the United States Forest Service's ("the Forest Service's") approval of the Reyes Peak Forest Health and Fuels Reduction Project ("Reyes Peak Project" or "Project") located on Pine Mountain Ridge in Los Padres National Forest. The Project will involve logging of trees and mastication of plants on more than 750 acres of public land, possibly using a commercial timber sale, and allows removal of an unlimited number of old-growth trees as large as sixty-four inches in diameter.

Pine Mountain Ridge—which includes Reyes Peak at its tallest point—is one of the most biologically-diverse hotspots in Los Padres National Forest, and a sacred landscape to the Chumash people. It contains the only "sky island" in the area, meaning it provides unique habitat to higher-elevation species that cannot survive in the nearby lowland regions. The ridge is home to over 400 species of native plants and sensitive wildlife, such as the endangered California condor and California spotted owl. The Project is located entirely within ancestral lands of the Chumash people. Pine Mountain (traditionally known as "Opnow") is a sacred peak that is significant to the spiritual and religious beliefs of the Chumash, and the Project area contains an abundance of sensitive cultural sites. In addition, approximately forty percent of the Project is within the Sespe-Frazier Inventoried Roadless Area ("IRA"), a specially designated area in which logging is generally prohibited. Pine Mountain Ridge is a popular destination for visitors and families to enjoy hiking, camping, rock climbing, bird watching, cross-country skiing, and other outdoor recreation.

Rather than conduct a meaningful assessment of the impacts of the Project, the Forest Service relied on categorical exclusions ("CEs") to approve the Project, despite widespread opposition and concerns. Unlike an environmental assessment ("EA") or environmental impact statement ("EIS"), CEs do not require detailed analysis of a project's environmental harm or consideration of alternatives that would lessen the project's impacts, and they provide minimal public participation.

The Forest Service's approval of the Project violated the National Environmental Policy Act ("NEPA") in several ways. First, the Forest Service failed to conduct a lawful scoping process with respect to 36 C.F.R. § 220.6(e)(6) ("CE-6"). Second, that CE cannot be used here because it does not cover all of the activities allowed by the Project. 36 C.F.R. § 220.6(e)(6). Third, the Forest Service failed to meet the requirements of the other CEs it invoked, which are contained in the Healthy Forests Restoration Act ("HFRA"), 16 U.S.C. §§ 6591b, 6591d, because the agency authorized the logging of old-growth and large trees, ignored the best available science, and failed to adequately collaborate with stakeholders. Fourth, even if the Project met the terms of the above CEs, reliance on a CE is unlawful here because "extraordinary circumstances" exist due to the Project's potential harm to local "resource conditions"—including cultural sites, rare species, and the Sespe-Frazier IRA. 36 C.F.R. § 220.6(b),(c).

In addition, the Forest Service conducted an Endangered Species Act ("ESA") consultation with the Fish and Wildife Service ("FWS") concerning the Project's effects on the endangered California condor. However, the FWS arbitrarily concluded the Project would "not likely adversely affect" condors or their critical habitat based on the unfounded assertion that large trees (on which condors rely) would be retained.

Moreover, the Forest Service violated the Roadless Area Conservation Rule ("Roadless Rule"; Roadless Area Conservation Final Rule, 66 Fed. Reg. 3,244 (Jan. 12, 2001) (to be codified in 36 C.F.R. pt. 294)),[1] which limits logging in IRAs, by authorizing the unlimited logging of trees up to sixty-four inches in diameter in the Sespe-Frazier IRA, thereby failing to protect the IRA's wild character. *See* 36 C.F.R. §

[1] The Roadless Rule appears in the 2001-2004 editions of the Code of Federal Regulations, at 36 C.F.R. §§ 294.10-14. In 2005, it was replaced by the State Petitions Rule. 70 Fed. Reg. 25,654 (May 13, 2005). When that replacement was set aside the following year, the Roadless Rule was reinstated. *California ex rel. Lockyer v. USDA*, 459 F. Supp. 2d 874 (N.D. Cal. 2006), *aff'd*, 575 F.3d 999 (9th Cir. 2009). However, the General Printing Office has thus far not conformed the current published Code accordingly. This brief therefore contains citations to the 2001 Roadless Rule Federal Register Notice in addition to 36 C.F.R. part 294.

294.13. Finally, the Forest Service has failed to prepare and submit annual reports concerning its use of CEs as required by HFRA. 16 U.S.C. §§ 6591b, 6591d.

Plaintiffs seek to have this Court declare unlawful, vacate, and set aside the Forest Service's approval of the Reyes Peak Project and the FWS's decision that the Project is not likely to adversely affect California condors or their critical habitat. Plaintiffs also seek declaratory relief concerning the violations described herein, and injunctive relief prohibiting Defendants from proceeding with the Reyes Peak Project without first issuing a final EIS and completing formal consultation under the ESA.

FACTUAL BACKGROUND

I. Reyes Peak Project Collaboration and Scoping Process

On May 27, 2020, the Forest Service announced the Reyes Peak Project by issuing a scoping letter and associated Project proposal. Forest Service Administrative Record ("AR") 4264-4265; AR 4236-4262. Plaintiffs and most community stakeholders, including local Native American tribes, conservation groups, independent scientists, industry groups, and local property owners, were excluded from participating in the Forest Service's preparation of the Project and were not notified of the Project until scoping was announced. By that time, the Forest Service had already delineated the Project boundary, developed the Project description and design, determined the Project purpose and need, and chosen to proceed via CE rather than an EA or EIS.

The Forest Service scoping letter stated that the agency did not plan to prepare an EA or EIS because it believed the Project falls within "Section 603 of HFRA (16 U.S.C. 6591b), Insect and Disease Infestation; Section 605 of HFRA (16 U.S.C. 6591d), Wildfire Resilience." AR 4264-4265. The scoping letter did not speak to any other CEs under NEPA. The Project proposal stated that the Forest Service planned to conduct vegetation treatments, such as commercial thinning of trees and mastication of chaparral, on approximately 755 acres, including within the Sespe-Frazier IRA. AR 4236.

The Project was proposed in the wake of Executive Order 13855, which directed the Forest Service to sell 3.8 billion board feet of timber, and memos from the Acting Deputy Chief encouraging the agency to invoke CEs and "explore creative methods" to exclude actions like the Project from environmental review. AR 8378.

II. Scoping Comment Letters and Project Impacts

The Forest Service received overwhelming public opposition to the Project, with roughly 16,000 comments submitted, and over ninety-nine percent in opposition. Plaintiffs submitted comments along with many other entities, including: former Ojai Mayor Johnny Johnston, Ventura County Supervisor Linda Parks and former Supervisor and current State Assemblymember Steve Bennett, former State Senator Hannah-Beth Jackson, Congressmembers Julia Brownley and Salud Carbajal, leaders from local Native American groups, the California Department of Fish and Wildlife ("CDFW"), nearly 100 local businesses, and seventy environmental organizations. Plaintiffs' comment letters, as well as those submitted by agencies and independent scientists, discussed at length how the Project would harm the forest, wildlife, cultural sites, and the Sespe-Frazier IRA. *See, e.g.*, AR 5851-5949; AR 5541-5542; AR 8424-8455.

Many letters also requested that an EA or EIS be conducted, especially in light of the fact that the Project would log some of the biggest and oldest trees in the area. AR 5851-5949. Several Native American Tribes submitted comments in opposition to the Project, identifying the presence of valuable cultural and religious resources that would be significantly impacted by the Project. *See, e.g.*, AR 8627-8629. Many letters also explained why the Project's location was misguided—approximately thirty-four percent of the Project area is being considered for addition to the Sespe Wilderness, a protected area where logging would be prohibited. AR 5902, 5948. In addition, the Project alters 311 acres of the Sespe-Frazier IRA by removing a substantial portion of the trees and shrubs currently present, and an unlimited number of large trees, up to sixty-four inches in diameter, that contain dwarf mistletoe or for unspecified safety reasons. AR 5901.

III. Decision Memo and Project Approval

On October 4, 2021, the Forest Service issued its Decision Memo approving the Reyes Peak Project. Despite the widespread opposition, the Forest Service made no meaningful changes to the Project, and instead, in addition to the CEs described in the scoping letter, it relied on yet another CE found at 36 C.F.R. § 220.6(e)(6). AR 11803.

LEGAL BACKGROUND

I. The National Environmental Policy Act and Healthy Forests Restoration Act

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[2] NEPA establishes two overarching purposes: (1) to create an open, informed and public decision-making process; and (2) to require that federal officials consider environmental consequences and take actions that "protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(b), (c). NEPA "emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003).[3]

NEPA requires each federal agency to prepare, and circulate for public comment, a detailed statement, or EIS, prior to undertaking any major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C). When a federal agency is not certain whether an EIS is required, it may prepare an environmental assessment, which must provide sufficient "evidence and analysis" for determining whether an action has significant impacts. 40 C.F.R. § 1508.9(a)(1). In undertaking NEPA analysis, an agency must consider direct, indirect, and cumulative effects. 40

[2] Because the NEPA process for this Project began before September 14, 2020, and because the agency relied on the 1978 NEPA regulations when approving the Project, the 1978 regulations are cited in this brief. *See* 85 Fed. Reg. 43304 (July 16, 2020) (stating that the NEPA regulations addressed in the rulemaking "apply to any NEPA processes begun after September 14, 2020").

[3] Unless otherwise noted, internal citations and quotations are omitted from case citations.

C.F.R. § 1508.8. In addition, when conducting environmental analysis pursuant to an EA or EIS, an agency must consider alternatives to the proposed action. *See e.g.,* 40 C.F.R. § 1508.9(b). The analysis of alternatives is "the heart" of NEPA environmental analysis. 40 C.F.R. § 1502.14; *California v. Block*, 690 F.2d 753, 766-68 (9th Cir. 1982).

In narrow situations, neither an EA nor an EIS is required, and federal agencies may invoke a "categorical exclusion" from NEPA. 40 C.F.R. §1501.4(a). Agencies may establish specific categories of actions that "do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect." 40 C.F.R. §§ 1508.4, 1507.3(b). The Forest Service has codified CE regulations at 36 C.F.R. § 220.6 and Section 1909.15 of the Forest Service Handbook ("Handbook").[4] The Forest Service's regulations require "scoping" prior to the use of a CE. *See* 36 C.F.R. § 220.6(c); 36 C.F.R. § 220.4(e). In addition to the Forest Service's regulatory CEs, Congress has created statutory CEs that the Forest Service may use in limited circumstances. For purposes of this case, the statutory CEs can be found in HFRA Section 603 (16 U.S.C. § 6591b) and Section 605 (16 U.S.C. § 6591d) ("CE 603" and "CE 605"). AR 11803. HFRA identifies these kinds of projects as Collaborative Restoration Projects. 16 U.S.C. §§ 6591b, 6591d. HFRA also requires that the Forest Service prepare and submit annual reports on the use of HFRA CEs. *Id*. at 6591b(g)(2).

The agency may only rely on a CE if no "extraordinary circumstances" exist. 40 C.F.R. § 1508.4. The Forest Service's regulations include a list of resource conditions that must be considered in evaluating the presence of "extraordinary circumstances." 36 C.F.R. § 220.6(b). If there is substantial evidence that extraordinary circumstances exist, use of a CE is prohibited. *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002).

II. The Endangered Species Act

The ESA is "the most comprehensive legislation for the preservation of

[4] The Handbook is available at the following Forest Service website: https://www.fs.usda.gov/cgi-bin/Directives/get_dirs/fsh?1909.15

endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Its purposes are to "provide a means whereby the ecosystems upon which [listed] species depend may be conserved" and to "provide a program for the conservation of such [species]." 16 U.S.C. § 1531(b). The ESA provides protections for listed species, to ensure not only their continued survival, but their ultimate recovery.

One such protection, Section 7(a)(2), requires federal agencies to avoid actions that are likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2). The ESA achieves this mandate through the consultation process with expert wildlife agencies, during which agencies must use the best scientific and commercial data available in order "to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176 (1997). This standard gives "the benefit of the doubt to the species." *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). Agencies prepare biological assessments to determine if an action is "likely to adversely affect" a listed species. 50 C.F.R. § 402.14. If so, formal consultation is required. 50 C.F.R. §§ 402.14(a), 402.12(k). Through formal consultation, FWS prepares a biological opinion as to whether the action will cause jeopardy and, if so, suggests "reasonable and prudent alternatives" to the action. 16 U.S.C. § 1536(b)(3)(A).

III. The Roadless Area Conservation Rule

The Roadless Rule was established "to protect and conserve inventoried roadless areas on National Forest System lands." 66 Fed. Reg. 3,244. IRAs "comprise only 2% of the land base in the continental United States," but "provide clean drinking water, . . . large, relatively undisturbed landscapes that are important to biological diversity and the long-term survival of many at-risk species, . . . [and] opportunities for dispersed outdoor recreation, opportunities that diminish as open space and natural settings are developed elsewhere." *Id*. at 3,245. To achieve its intent, the Roadless Rule generally prohibits logging in IRAs, subject to limited exceptions. *Id*. at 3,273.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In record review cases like this case, the Court "may direct that summary judgment be granted to either party based upon [its] review of the administrative record." *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012).

Courts review agency actions pursuant to the Administrative Procedure Act ("APA"), which provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In making their determinations, courts must conduct a searching and careful review of the agency action, to ensure that the agency has articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency's action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

ARGUMENT

I. Plaintiffs Have Article III Standing.

Plaintiffs[5] have standing to bring their claims alleging violations of NEPA, HFRA, the ESA, and the Roadless Rule. Specifically, an organization "has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and

[5] Although all Plaintiffs in the Consolidated Cases, including the County of Ventura and City of Ojai, are signatories to this joint brief, this section relating to standing focuses solely on the Los Padres ForestWatch, *et al.* plaintiffs (Case No. 2:22-cv-02781-JFW-SK), as the County and City will establish their own standing in their separate 5-page briefs authorized by the Court's order dated December 14, 2022. ECF No. 85.

neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). As conservation organizations focused on the protection of public lands, including our national forests, the interests at stake in this case—e.g., protection of old-growth trees, logging of condor habitat, and a roadless area—are plainly germane to Plaintiffs.

Plaintiffs have members who can establish standing. For an organization's member to establish standing, 1) the member must suffer an "injury in fact"; 2) that injury must be fairly traceable to the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision. *Laidlaw*, 528 U.S. at 180-81. Here, as demonstrated in the attached declarations, members of the Plaintiff organizations will suffer injury-in-fact from the alleged violations of NEPA, HFRA, the ESA, and the Roadless Rule in relation to the Reyes Peak Project. Plaintiffs' members have established repeated and consistent use of the Project area and have concrete plans to return there, and they suffer concrete, particularized harm due to the Project's impacts on the environment, wildlife, recreational opportunities, and cultural resources. *See* Declaration of Jeffrey Kuyper ("Kuyper Decl.") ¶¶ 2-12; Declaration of Maura Sullivan ("Sullivan Decl.") ¶¶ 2-19; *see also* declarations of Chris Morissette, Taylor Luneau, Alasdair Coyne, Chad Hanson, Jeff Miller, Hans Cole, and Richard Halsey. This constitutes injury in fact. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice.").

Plaintiffs' members' use and enjoyment of this area is severely impacted by the Project and this injury is directly traceable to approval of the Project. Kuyper Decl. at ¶¶ 10-11; Sullivan Decl. at ¶¶ 16-17. Finally, a favorable judicial decision will prevent or redress that injury by compelling the Forest Service to follow laws that help protect the

areas and wildlife that Plaintiffs' members enjoy and allow Plaintiffs to participate fully in the agency processes as required by law. Kuyper Decl. at ¶¶ 11-12; Sullivan Decl. at ¶¶ 18-19. Plaintiffs have also suffered an injury due to the Forest Service's failure to issue the reports required by HFRA. Kuyper Decl. at ¶¶ 4-5; Miller Decl. at ¶ 12; *see also Lundstrom v. Young*, No. 18-cv-2856-GPC, 2022 WL 15524624, at *15 (S.D. Cal. Oct. 27, 2022) ("An informational injury can constitute concrete harm under Article III so long as Plaintiff alleges actual harm resulting from the informational injury.").

II. The Forest Service Violated the National Environmental Policy Act.

The Forest Service violated NEPA in approving the Reyes Peak Project by failing to undertake adequate scoping; improperly invoking CE-6; failing to adhere to the requirements of the statutory CEs; and declining to prepare an EIS despite the presence of extraordinary circumstances.

A. The Forest Service Failed to Conduct Scoping Regarding its Reliance on CE-6.

In approving the Project, the Forest Service relied in part on CE-6. AR 11803. As discussed below, however, the Forest Service failed to properly scope its use of CE-6 because the Project's scoping letter (AR 4264-4265) and associated Project proposal (AR 4236-4262) did not alert the public that the Forest Service would rely on CE-6.

For purposes of NEPA, "scoping" is defined as the "early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." 40 C.F.R. § 1501.7. The Forest Service's NEPA regulations require "scoping" prior to the use of a CE. *See* 36 C.F.R. § 220.4 ("Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded from further analysis and documentation in an EA or an EIS (§ 220.6)."); 36 C.F.R. § 220.6(c) (explaining that the Forest Service's determination of whether an EA or EIS is necessary must be "based on scoping"). The Forest Service's Handbook further explains that "scoping is important to discover information that could

point to the need for an EA or EIS versus a CE." Handbook 1909.15, § 31.3.

Neither the Project scoping notice letter (AR 4264-4265), nor its associated Project proposal (AR 4236-4262), mentions any intent for the Project to rely on 36 C.F.R. § 220.6(e)(6). Instead, these documents speak only to two other CEs: "The proposed project falls within two categories of actions that do not require documentation in an Environmental Assessment or an Environmental Impact Statement: Categories statutorily established by Congress: • Section 603 of HFRA (16 U.S.C. 6591b), Insect and Disease Infestation • Section 605 of HFRA (16 U.S.C. 6591d), Wildfire Resilience." AR 4265; *see also* AR 4237 (Project proposal stating: "The Healthy Forest Restoration Act authority (2003, as amended 2018) would be used for this project").

Because "[s]coping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded" (36 C.F.R. § 220.4), and because the Forest Service did not state in its scoping notice letter or associated project proposal that the agency intended to rely upon CE-6, the public was not properly notified regarding "the scope of issues to be addressed." 40 C.F.R. § 1501.7. This failure to properly notify the public matters because, as stated in the Forest Service's regulations and Handbook, scoping is the process by which the agency determines whether a CE applies to a project or if instead there is a need for an EA or EIS. 36 C.F.R. § 220.6(c); Handbook 1909.15, § 31.3. If the public does not learn of the application of a particular CE until after the project is approved, then they are denied any opportunity to explain the inapplicability of that CE during the agency's decision-making process.

Due to the failure to properly scope the Project's reliance on CE-6, the Forest Service is in violation of its own regulations and therefore cannot proceed under CE-6. *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations."); 5 U.S.C. § 706(2)(A) ("reviewing court shall . . . hold unlawful and set aside agency action . . . not in accordance with law").

B. The Forest Service Cannot Lawfully Apply CE-6 to the Reyes Peak Project.

The Project authorizes the removal of snags (i.e., dead trees that are still standing) and downed material. AR 11804; *see also* AR 10501 ("Implementation of the proposed action would remove most dead and down materials, including snags."). In addition, the Project authorizes the logging of live trees up to sixty-four inches in diameter if they contain dwarf mistletoe. AR 11799. The Project Decision Memo, however, contains no explanation as to why these activities are allowed under CE-6. *See* AR 11825 (citing to 36 C.F.R. § 220.6(e)(6) for thinning and prescribed fire actions only). Moreover, the language of CE-6 makes plain that it does not allow the logging of snags or trees containing dwarf mistletoe.

CE-6 contains four examples regarding what activities fall under it: "(i) Girdling trees to create snags; (ii) Thinning or brush control to improve growth or to reduce fire hazard including the opening of an existing road to a dense timber stand; (iii) Prescribed burning to control understory hardwoods in stands of southern pine; and (iv) Prescribed burning to reduce natural fuel build-up and improve plant vigor." 36 C.F.R. § 220.6(e)(6). In *Envtl. Prot. Info. Ctr. v. Carlson*, the Ninth Circuit explained that when examples are provided in a CE, "the clear inference (even without invoking the principle of ejusdem generis), is that other examples should be similar in character to the examples provided." 968 F.3d 985, 990 (9th Cir. 2020).

None of the examples in CE-6 authorize the logging of snags, and instead, the examples speak only to "*creat[ing]* snags," not removing them. 36 C.F.R. § 220.6(e)(6)(i) (emphasis added). Because logging a snag is not "similar in character to" creating a snag, no rational basis exists for the use of CE-6 with respect to the logging of snags. This reality is further reinforced by the fact that there exists a Forest Service CE that addresses the logging of snags, but that CE—36 C.F.R. § 220.6(e)(13)—explicitly allows only the logging "of dead and/or dying trees *not to exceed 250 acres*,"

and therefore is not applicable to the Reyes Peak Project, which covers approximately 755 acres. AR 11786.

Logging of trees that contain dwarf mistletoe is likewise unjustified under CE-6. The forests of Pine Mountain naturally contain dwarf mistletoe, a native parasitic plant that grows primarily on Jeffrey pine in the area. AR 5856; *see also* AR 5933 (showing a picture of dwarf mistletoe in the Project area, as seen on a healthy Jeffrey pine tree). Removing large trees containing mistletoe, especially without any limitation as is the case here, does not improve the stand; instead, such trees are essential to forest health and ecosystem integrity. AR 5856. For example, Bennetts *et al*. (1996) found that the presence of dwarf mistletoe is necessary for "healthy diverse forest ecosystems" and is associated with increased bird diversity. *Id*.; *see also* AR 8591 (noting that "dwarf mistletoe species are documented as plant medicines for both the Chumash and neighboring tribes").

A court "cannot defer to a void," and here the Forest Service provides no basis at all, let alone a rational one, for using CE-6 to authorize the logging of snags or trees containing mistletoe. *Or. Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1142 (9th Cir. 2008). This Court should therefore find the agency's approval of the Project to be arbitrary and capricious because it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.[6]

C. The Forest Service Cannot Lawfully Apply the HFRA CEs to the Project.

Congress limited the use of the HFRA CEs to a narrow set of circumstances. In order to rely on HFRA CEs 603 and 605, the Forest Service must: 1) "maximize the retention of old-growth and large trees, as appropriate for the forest type, to the extent

[6] In *Mt. Cmtys. for Fire Safety v. Elliott*, 25 F.4th 667 (9th Cir. 2022), the Ninth Circuit found that CE-6 can be interpreted to allow a type of logging known as "commercial thinning." However, the Court was not confronted with, and therefore did not decide, the issue presented here: whether CE-6 allows the logging of snags or the logging of trees containing dwarf mistletoe.

that the trees promote stands that are resilient to insects and disease;" 2) "consider[] the best available scientific information to maintain or restore the [forest's] ecological integrity, including maintaining or restoring structure, function, composition, and connectivity;" and 3) ensure the project is "developed and implemented through a collaborative process that includes multiple interested persons representing diverse interests; and is transparent and nonexclusive . . ." 16 U.S.C. § 6591b; 16 U.S.C. § 6591d. Additionally, a project must either be located "in the wildland-urban interface," or "in Condition Classes 2 or 3 in Fire Regime Groups I, II, or III," outside the wildland-urban interface. *Id*. Both CE 603 and CE 605 have identical criteria for eligibility; however, CE 605 applies to Wildfire resilience projects and additionally requires that a project demonstrate increased resilience to wildfires. 16 U.S.C. § 6591d(b)(1)(A). A failure to meet just one of these criteria will render application of these CEs unlawful. *Id.*; *see also Alliance for Wild Rockies v. Higgins*, 535 F. Supp. 3d 957 (D. Idaho 2021). Here, the Forest Service failed to meet *any* of these requirements and therefore cannot apply CE 603 and CE 605 to avoid doing an EA or EIS pursuant to NEPA.

1. The Forest Service Failed to Demonstrate that the Project Maximizes Retention of Old-Growth and Large Trees.

CEs 603 and 605 cannot be used here because the Project does not "maximize the retention of old-growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insects and disease." 16 U.S.C. § 6591b(b)(1)(A); 16 U.S.C. § 6591d(b)(1)(A). The Project's "activities" and "exceptions" allow for logging an unlimited and unknown number of old-growth and large trees that the agency failed to disclose, analyze, and consider.

a. The Forest Service Presented Inaccurate Information About the Project's Removal of Large and Old-Growth Trees.

The Forest Service provided misleading and inaccurate information about the Project's retention of old-growth and large trees. The Project defines "large trees" as those larger than 24 inches in diameter at breast height ("dbh"), consistent with the

Forest Plan, yet fails to define "old-growth trees." AR 11800. The Decision Memo discloses "that nearly half of the trees in the project area are 24-inch in diameter or higher at breast height ("dbh")" and declares that "none of these [large] trees will be removed." AR 11809; *see also* AR 11810 ("[N]o trees in the greater than 24-inch classes are planned to be removed."). Appendix B also states that "larger-diameter trees as defined in the forest plan (24 inches and greater) will be retained after treatment." AR 11830. Even the Forest Service's Ecologist, Nicole Molinari, believed that "there is no plan to remove trees >24" DBH." AR 4825. Given these statements, the public was led to believe that the Project would not permit removal of large trees. Yet, as detailed below, the Project in fact authorizes the removal of an unknown and unlimited number of large and old-growth trees through several activities, "treatments," and exceptions that in effect swallow the 24-inch dbh limitation. AR 11799, 11800-11801.

b. Project "Treatments" Authorize the Removal of an Unknown and Unlimited Number of Old-Growth and Large Trees.

Several of the Project's "treatments" will result in removal of old-growth and large trees that the Forest Service did not analyze. For example, the Project will create a variable-width shaded fuelbreak, but no information is provided about its size or location or how many trees will be removed during fuelbreak construction and maintenance. AR 11801. The Project will also allow for an unknown number of old-growth or large trees to be killed through prescribed fire and provides no information about how many acres will be burned or who would be in charge of making that decision. AR 11801. The Decision Memo states only that "prescribed fire would be used in areas as determined by a responsible official." *Id*. There is no limitation on the size of the trees or protection for old-growth trees that will be killed by prescribed fire. AR 11820.

c. The Project's "Exceptions" Are So Broad and Undefined They Allow for Unlimited Large and Old-Growth Tree Removal.

In addition to the authorized treatments, the Project also includes three very broad exceptions that allow for the removal of an unknown and unlimited number of large and

old-growth trees. First, the Project has an exception to the 24-inch dbh limit that authorizes trees as large as sixty-four inches in diameter to be cut if the trees contain any amount of dwarf mistletoe, with no limits or estimated numbers of trees impacted provided. AR 11799 and 11800. In fact, no further information is provided about what constitutes "dwarf mistletoe infestations" or a tree being "impacted by dwarf mistletoe" or why it should be an exception to the 24-inch dbh limit. Plaintiffs presented scientific evidence that shows dwarf mistletoe is associated with increased avian diversity. AR 5856. Plaintiffs have observed dwarf mistletoe on some of the largest trees in the Project area, well above 24-inches dbh. *Id*. Thus, many large trees could potentially be removed with this exception. Yet, the Forest Service failed to provide any information or analysis about how many large and old growth trees contain mistletoe and will be removed under this exception. In fact, Table 7 in the Decision Memo is misleading and shows that zero trees over 24-inches dbh will be logged. AR 11810. Likewise, the Forest Service provided no information or analysis explaining why removal of dwarf mistletoe is necessary and justifies the potentially significant loss of large and old-growth trees.

The second exception allows for an unknown and unlimited amount of old-growth and large trees (live or dead) to be removed for "safety reasons" and along roads, trails, campgrounds, and landings. AR 11801. Yet what constitutes "safety reasons" is to be "determined on a case-by-case basis to provide for the safety of employees, contractors, and the public, and overall forest health." AR 11799. This vague, open-ended language allowing removal for "overall forest health" casts such a broad exception that its application allows for the Forest Service to negate the 24-inch dbh limit on an *ad hoc* basis. AR 11799. The Project also does not state who will make the determination that a tree requires removal for safety reasons, allowing for anyone carrying out the Project to remove a large old old-growth tree without any documentation or reason other than for undefined "overall forest health."

Third, the Forest Service has an exception identified in Appendix A that allows for "[t]rees near known cultural resources [to be] felled away from site boundaries . . ." AR 11820. As discussed below, the Project area has extensive cultural resources on site. This exception could authorize the removal of a potentially significant number of the old-growth and large trees that have not been accounted for by the Forest Service.

d. The Forest Service Failed to Provide Any Information or Analysis of the Project's Retention of Old-Growth and Large Trees for Insect and Disease Resiliency.

Lastly, the Decision Memo states that the "[p]roject activities maximize the retention of old-growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insect and disease," yet, no supporting information is identified or discussed. AR 11830. Inexplicably, the Project is void of any information regarding old-growth trees. In fact, the Forest Service failed to even define what constitutes an old-growth tree in the Project area and failed to provide any inventory or tree stand data concerning old-growth trees in the Project area. Nor did the Forest Service discuss the role of old-growth trees in the Project area with respect to disease and insect resiliency or explain how old-growth trees would be maximized for that purpose.

According to the Project's silviculture report, the "Land and Management Resources Plan direction is to create conditions to promote larger trees." AR 11752. The report continues to express concern about large tree mortality in the area, particularly in large conifers. AR 11753. The Decision Memo states further that "existing forest stand structure in the project area is not favorable for creating forests that are resilient to the effects of drought, insects and disease, and stand replacing wildfires." AR 11791.

Thus, maximizing retention of large and old-growth trees is necessary for insect and disease resilience. Yet the Project fails to account for and analyze the significant removal allowed by the Project's "treatments" and "exceptions" and the resulting impact on the remaining stand's insect and disease resiliency. Without knowing how many large

and old-growth trees will remain in the Project area after the Project's treatments and activities, the Forest Service lacks necessary information to make this determination, and its application of CE 603 and CE 605 is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

2. The Forest Service Failed to Consider the Best Available Science to Ensure the Forest's Ecological Integrity.

The Forest Service also failed to "consider the best available scientific information to maintain or restore the [forest's] ecological integrity, including maintaining or restoring structure, function, composition, and connectivity." 16 U.S.C. § 6591b; 16 U.S.C. § 6591d. The record here shows that the Forest Service's plan to remove trees to ensure the Forest's ecological integrity relied upon tree density targets that are not supported by the record or its own scientific reports, and excludes necessary scientific information. As detailed below, the Forest Service's data shows that the Project's tree thinning treatments may not even be necessary.

First, the Forest Service failed to consider the loss of large and old-growth trees and the impact such loss will have on the ecological integrity of the forest, as discussed above. AR 11799-11801. Consequently, the Forest Service lacks necessary information to ensure that the actual number and composition of large and old-growth trees in the remaining forest stands after treatment are sufficient to ensure the forest's ecological integrity, such as maintaining or restoring structure that requires large trees. Moreover, the best available science shows that dwarf mistletoe is an important aspect of ecological integrity and therefore the large trees containing dwarf mistletoe should be retained, not logged. AR 6012-6022 (published study explaining how dwarf mistletoe "may have positive influence on wildlife habitat," is "positively associated with" bird abundance, and "may have enhanced the nesting opportunities of several bird species"). Furthermore, retention of large and old-growth trees is identified in the Project's silviculture report and the Forest Plan as necessary to meet the "desired conditions" of

the Project such as "encouraging a stand structure that emphasizes large-diameter trees." AR 11751, 5858.

In fact, the best available science shows that the removal or logging of medium and large sized trees can be antithetical to making the forest more resilient to wildfire and have a detrimental impact on ecosystem health. AR 5925. A project that allows for an unlimited and unknown number of large trees to be removed does not ensure the forest's ecological integrity according to the Forest Service's admission. Moreover, Plaintiffs submitted evidence finding that removal of large trees may be detrimental to the goals of the Project to prevent fire. Bond *et al.* (2009b) found that stands dominated by large trees burned at lower severities than stands dominated by smaller trees. AR 6629-6635. They concluded that "harvesting larger-sized trees for fire-severity reduction purposes is likely to be ineffective, and possibly counter-productive." AR 6634.

Second, the agency does not use the best available science to support the Project's tree removal targets to reduce forest density. Notably, the agency only identifies a single source (Fettig et al. 2012) to justify the general removal of trees for the stated purpose of increasing resistance to bark beetles, even though the scientific literature has significantly documented the futility of such projects. AR 11791. Evidence submitted by Plaintiffs shows that treatment for bark beetle infestations, which involved tree thinning, was often the primary source of mortality, not the bark beetle. AR 5862-5863. In one study, approximately 289 trees per hectare were killed by thinning in order to only prevent ten trees from being killed in the future by bark beetles. AR 5862.

Similarly, the Project proposes to remove more trees in the Project area than are projected to be destroyed by beetles. AR 5909-5910. Basal area is used as a measure of tree stand density by the Forest Service and measures the square feet of tree stump area per acre. AR 5861. The Decision Memo states that the areas proposed for treatment are categorized as high risk for pests that could destroy over twenty-five percent of current basal area. AR 11790. The average basal density in the Project area is 120 (per Project

Proposal), and the Decision Memo states that the Project proposes to thin trees to a range of 60 to 100 basal area per acre, with a target basal area average of 80. AR 11799, 4246. Thus, the Project proposes to reduce tree density by as much as fifty percent, and an average of thirty-three percent, in order to save the forest from pest damage that poses a much smaller threat of only a twenty-five percent reduction in basal area. AR 11790. Given these facts, it is hard to connect the dots and arrive at the same conclusion as the Forest Service to justify such a severe reduction in tree density for pest management. There is no rational basis to support the Forest Service's arbitrary tree removal targets for pests. This Court "must disapprove the agency's action" "where the agency's reasoning is irrational, unclear, or not supported by the data it purports to interpret." *Northwest Coalition for Alternatives to Pesticides ("NCAP") v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008).

Lastly, and most importantly, the Forest Service's own scientific evidence and information does not support the Project's tree removal targets. The Forest Service's silviculture report (which was withheld from the public until after the Decision Memo) does not support the Project's basal area targets used to justify tree removal treatments. AR 5889-5890. The silviculture report states that the Project area should be thinned to an average basal area of 126. AR 11752 (Table 3). At a basal area of 126, "[t]he post treatment stand structure is predicted to be "Moderately effective" or "84 percent effective at minimizing expected bark beetle mortality under drought conditions." AR 11752. Yet, the target basal area in the Decision Memo is 80, which is significantly lower than 126, contradicting the data and conclusions in the silviculture report. The Decision Memo cites no other basis or support for the Project's basal area target of 80.

Moreover, since the average basal area of the Project is 120, and the silviculture report's basal target is 126, there appears to be no need for the Project's tree removal treatments to relieve density-induced stress, or increase resilience against fire, disease and pests, in order to ensure the forest's ecological integrity. Thus, the Project's target

basal area used in the Decision Memo to justify the Project's tree removal activities is not supported by the evidence in the record, or the best available science. Where the Forest' Service's decision runs counter to the evidence, as is the case here, that decision is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43.

3. The Forest Service Failed to Develop and Implement the Reyes Peak Project Using a Collaborative Process.

HFRA requires that a Collaborative Restoration Project relying on HFRA CE 603 and CE 605 must be "developed and implemented through a collaborative process that (i) includes multiple interested persons representing diverse interests; and (ii)(I) is transparent and nonexclusive. . ." 16 U.S.C. § 6591b(b)(1)(C) and 16 U.S.C. § 6591d(b)(1)(C). Collaboration is defined for the purposes of HFRA as: "a structured manner in which a collection of people with diverse interests share knowledge, ideas, and resources while working together in an inclusive and cooperative manner toward a common purpose." 36 C.F.R. § 219.19. HFRA further states of this process (called "Public Collaboration"):

> In order to encourage meaningful public participation *during preparation* of authorized hazardous fuel reduction projects, the Secretary shall facilitate collaboration among State and local governments and Indian tribes, and participation of interested persons, during the preparation of each authorized fuel reduction project *in a manner consistent with the Implementation Plan*.

16 U.S.C. § 6514(f) (emphasis added).

Here, the Forest Service has not facilitated Public Collaboration in the preparation of the Project. Scoping was initiated on May 27, 2020. AR 4264. The Decision Memo admits that community outreach for collaboration prior to scoping was limited to fire personnel, agencies, and a few Native American tribes: "Community involvement with local and county fire personnel, including Ventura County Fire Department, U.S. Fish and Wildlife Service, and tribes preceded scoping." AR 11812. None of Plaintiffs'

organizations, or the roughly seventy local and state stakeholder groups that signed and submitted scoping comments were invited to collaborate prior to scoping. AR 5950-5961. This is surprising since these organizations have a long-established history of participating in the environmental review of projects in Los Padres National Forest. Yet, none of the pre-scoping meetings and outreach engaged "multiple interested persons with diverse interests" since none of the environmental stakeholders were invited to collaborate or were even made aware of the Project prior to scoping. AR 5887. In fact, the pre-scoping outreach only involved one nongovernmental community stakeholder. AR 11812. Nor were any of the Forest's Service's pre-scoping efforts "transparent" or "inclusive" since the rest of the stakeholders were excluded from the outreach. *Id*.

In *Greater Hells Canyon Council v. Stein*, the court determined that the Forest Service complied with HFRA's collaborative process when it engaged community participation by multiple interested parties that included environmental, timber industry, agency, and tribal interests, at each stage of project development, more than a year prior to scoping. No. 2:17-cv-00843-SU, 2018 WL 3966289 (D. Or. June 11, 2018). In fact, the Forest Service reached out to the plaintiffs before it even sited the Project to see if they had any concerns and design considerations. There was substantial communication between the Forest Service and plaintiffs. *Id*. at 14. The court also cited as evidence of collaboration the fact that the project was modified several times to address feedback. *Id*. at 15.

In contrast, here, Plaintiffs had no communication with the Forest Service until the Project was already developed and scoping was initiated. Until then, Plaintiffs were not included or asked to provide any input on Project development, nor were they even aware of the Project. Even then, the Forest Service failed to incorporate Plaintiffs' scoping input into the Project's design standards. The evidence in the record does not support the Forest Service's determination that it engaged in a collaborative process. As

such, the Forest Service violated HFRA and its application of CE 603 and CE 605 was arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43.

4. The Forest Service Failed to Provide Information that the Project is in an Area Where Use of CE 603 and CE 605 is Allowed.

HFRA limits the application of CE 603 and 605 to projects that are located "in the wildland-urban interface" ("WUI"), or "within vegetation condition classes 2 or 3 and categorized as Fire Regime Groups I, II, or III, outside the wildland-urban interface." 16 U.S.C. § 6591b(a)(1). Here, the Forest Service has not demonstrated that the Project is located in a WUI or in Vegetation Class 2 or 3 in Fire Regime Groups I, II, or III.

The Forest Service admits that the Project does not fall within the WUI; however, the Forest Service failed to provide information or evidence in the Scoping Notice or the Decision Memo that the Project is located within Vegetation Condition Classes 2 or 3 *in* Fire Regime Groups I, II, or III. AR 4264-4265, 11786-11833. The Forest Service failed to provide a map or table that discloses the Fire Regime Group with the corresponding Vegetation Condition Class distribution in the Project area. This is critical information necessary to determine if CE 603 and CE 605 apply. Instead, the Decision Memo only provides incomplete pieces of information, which are insufficient to confirm the Project's location within these categories. For example, Table 5 discloses how many acres of the Project area are in each Fire Regime and Vegetation Type but not the Vegetation Condition Class. AR 11793. It does not disclose the Vegetation Condition Class acreage distribution in each Fire Regime Group for the Project area required to determine whether CE 603 and CE 605 can be applied. AR 11793-11794. To confound matters even more, the Project Description then includes Table 6 and a map in Figure 4 to show the distribution of the Vegetation Condition Classes over the Project area, but again fails to show which Fire Regime Group the Condition Classes are located in. AR 11793-11794. In fact, Table 6 actually shows that 61 acres of the Project area are categorized as "Vegetation Condition Class I" and 28 acres are classified as "urban

areas," and that only 88% of the Project actually falls within "Vegetation Condition Classes II and III." AR 11792-11793.

Under similar circumstances, courts have struck down the Forest Service's approval of a national forest project that relied on HFRA CE 603. In *Alliance for Wild Rockies v. Higgins*, F. Supp. 3d at 975-80, the Forest Service failed to provide maps and supporting information for its statement that the Project was located in the WUI, one of the areas covered by 16 U.S.C. § 6591b(a)(1), (2). The Court concluded:

> It is not enough to simply declare that the Project is within a wildland-urban interface, especially when the intended purpose of doing so – as in this case – is to avoid the requirement of preparing an EA (or EIS) as would otherwise be required under NEPA. There must be something else that connects the dots and thereby would support Defendants' position that the categorical exclusion under HFRA applies to the Project.

Id. at 977. Here, the Forest Service also provided nothing more than an unsupported declaration that the Project was located in the Vegetation Class 2 or 3 in Fire Regime Groups I, II, or III. No maps, evidence or analysis were provided to "connect the dots" and support the Forest Service's conclusion.

The Forest Service's application of CE 603 and CE 605 to the Reyes Peak Project was unlawful because it violated the requirements of 16 U.S.C. § 6591b and 16 U.S.C. § 6591d. Thus, the agency violated the requirements of HFRA and NEPA when it approved the Reyes Peak Project. Accordingly, the Decision Memo is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A).

D. Extraordinary Circumstances Warrant Further Analysis in an EIS.

Even if an action fits within the CEs identified above, the Forest Service "must determine that there are no extraordinary circumstances in which a normally excluded action may have a significant environmental effect" before the agency can forego an EA

or EIS. 73 Fed. Reg. 43,084, 43,091 (July 24, 2008) (rule for 36 C.F.R. § 220 *et seq*.). The Forest Service's regulation lists "[r]esource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS …." 36 C.F.R. § 220.6(b). "Extraordinary circumstances" are determined based on the presence of, and analysis of impacts to, the following "resource conditions" at issue in this case: "(i) Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species;…(iv) Inventoried roadless area or potential wilderness area;…(vi) American Indians and Alaska Native religious or cultural sites." 36 C.F.R. § 220.6(b)(1).

It is "the existence of a cause-effect relationship between a proposed action and the potential effect on these resource conditions, and if such a relationship exists, the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist." 36 C.F.R. § 220.6(b)(2). If the agency is uncertain whether the proposed action may have a significant effect on the environment, the agency cannot rely on a CE. 36 C.F.R. § 220.6(c); *see also* Handbook 1909.15, § 31.2 ("If the degree of potential effect raises uncertainty over its significance, then an extraordinary circumstance exists, precluding use of a categorical exclusion.").

Here, the Decision Memo identified resource conditions on the Project site, but concluded that the Project does not present extraordinary circumstances. The Forest Service, however, ignored important information in reaching that conclusion, and thus failed to provide a rational explanation of why the Project's potential impacts to resource conditions are insignificant. Instead, the Project adversely affects resource conditions to the extent that extraordinary circumstances exist and reliance on a CE is improper.

1. The Project Will Destroy or Damage Numerous Cultural Sites.

The Forest Service arbitrarily concluded there are no cultural sites in the Project area despite overwhelming evidence before the agency that the Project will destroy or

damage numerous cultural resources. The degree of potential effects on cultural sites precludes the use of a CE here. *See* 36 C.F.R. § 220.6(b)(1)(vi).

The Project area is located entirely within ancestral lands of the Chumash people and the record readily demonstrates that the Project will likely destroy or damage culturally significant sites.[7] For example, the Coastal Band of the Chumash Nation described the Project's alteration of the landscape as an "assault on our Chumash lifeways." AR 8628. That letter states: "Our people use this area for gathering medicine, seeking guidance from Creator through prayer as well as for mental and physical health." AR 8627. It pointed to evidence of grinding bowls that can be easily destroyed by mechanical equipment, and medicinal plants in the Project area. AR 8628. The old-growth trees are considered "allies and our witness to centuries of struggle" with colonial occupation—the trees themselves are "one of our sacred places." *Id*. Likewise, chapparal itself is a cultural resource; it houses animals that play an important cultural role in creation and tribal stories. *Id*.

Moreover, as stated in comments submitted by the Barbareño/Ventureño Band of Mission Indians, Pine Mountain Ridge and Reyes Peak "are among the highest promontories in Chumash territory" and belong to a "complex of Chumash sacred lands." AR 5501-5502. Reyes Peak is a "well-known central observation point, saturated with cultural and ceremonial significance." AR 5502. In addition, a group of eleven professional ethnohistorians and archaeologists commented that "numerous historical and ethnohistoric records attest" to the cultural significance of the Project area. AR 8588. They pointed to ethnographic field notes which identify Pine Mountain as one of three sacred peaks in Los Padres National Forest, which are "significant to the spiritual and religious beliefs of the Ventureño Chumash." AR 8589. The notes also identify a

[7] "Cultural sites" include former village sites, work sites, sacred sites, petroglyph and arborglyph sites, burials of human remains and associated cultural materials, and traditional gathering sites for ceremonial plants, medicine plants, food plants, basketry plants, and other material culture plants. AR 9068.

Chumash trail system that went directly through the Project area, and such trails are significant because they "incorporated ritualized forms of prayer, offerings, trail shrines as well as possessing potent cosmographic and spiritual significance." AR 8589. Moreover, "trees for the Chumash can be shrines in-and-of themselves." *Id.* In addition, "dwarf mistletoe species are documented as plant medicines for both the Chumash and neighboring tribes." AR 8591. Accordingly, removal of trees containing dwarf mistletoe "places traditional Chumash plant medicines, [and] potentially latent cultural & spiritual practices . . . in clear and present danger." *Id.*

The Forest Service previously acknowledged that cultural sites are likely present in the Reyes Peak Project area. In the Forest Service's 2015 Strategic Fuel Break Assessment, the agency recognized that cultural resources are present within 300 feet and 1000 feet of a hypothetical fuelbreak stretching along the ridgeline from Hwy 33 to Reyes Peak. AR 3525. However, in its Decision Memo, the Forest Service summarily concluded: "[b]ased on discussions with federally recognized tribes and agency research and analysis, there are no Native American religious or cultural sites within the project area." AR 11812. That one sentence is the full extent of the agency's extraordinary circumstances analysis of cultural sites. No analysis or information is presented to substantiate this conclusion, and it contradicts the comments submitted by local tribes, as well as the Forest Service's own findings.

In addition, the Project does not include Chumash monitors on site necessary to identify and prevent cultural resources from being significantly affected by the Project's logging and mastication activities. AR 11820 (including general "Heritage" design elements such as applying "protection measures" but failing to account for identification of important sacred resources and overlooking that trees and plant life themselves are sacred to tribes); AR 9068 ("Unlike archaeological sites, which can be identified from previous archaeological documentation, cultural sites can only be identified through consultation with Chumash tribes, bands, clans, and family groups."). There is zero basis

for the Decision Memo's conclusion that the Project will not "imperil cultural resources." AR 11802. Accordingly, the Forest Service's conclusion was arbitrary and capricious, and these impacts to cultural sites preclude reliance on CEs here. 36 C.F.R. § 220.6(c).

2. The Project May Adversely Affect Listed and Sensitive Species.

The Project may have significant adverse impacts on the federally-listed California condor; Forest Service sensitive animal species, including the California spotted owl, northern goshawk, fringed myotis, and pallid bat; and Forest Service sensitive plant species listed below. As such, reliance on CEs is unlawful here. *See* 36 C.F.R. § 220.6(b)(1)(i). The Forest Service's Decision Memo arbitrarily concludes that potential impacts to these species do not warrant further analysis by ignoring the potential impacts of removal of large trees and snags, and with respect to plant species, relying on likely flawed survey methodology. AR 11804-11808.

First, the Forest Service entirely failed to consider how the Project's essentially unlimited logging of large trees and removal of snags and dead or down material will affect bird and bat species. For example, the agency concludes that the California condor may be affected but is not likely to be adversely affected in part because "the larger trees favored by Condors for roosting will be retained and any incidental removal of the larger trees will be insignificant." AR 11804-11805. However, as explained above, the Project provides no such guarantees of retention of large trees and fails to disclose how many large trees will be removed.

Furthermore, with respect to the Condor, the Forest Service did not make a "no effect" finding. This recognition of potential impacts only points to the improper use of a CE here. *See Conservation Cong. v. U.S. Forest Serv.*, No. 2:12-02416 WBS KJN, 2013 WL 2457481, at *8 (E.D. Cal. June 6, 2013) (holding the no extraordinary circumstances conclusion was arbitrary because the Forest Service "did not determine that the project will not affect the [species]; rather, it concluded that the project is not *likely* to adversely

affect the [species]."); *Cf. Sw. Ctr. For Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (upholding finding of "extraordinary circumstances" because the project at issue in that case would have "no effect" on the Mexican spotted owl and it was not even clear whether the species was present in the project area at all).

The Forest Service recognizes the Project's adverse effects on goshawks as well: "As a result [of removing dead and down material], refugia and escape cover for prey species may be limited to stands adjacent to the project area and individuals within the project area may be displaced, injured, or killed." AR 11772. Moreover, there are 225 acres of predicted suitable habitat for the goshawk within the Project Area (or about 30%). AR 5897. The Forest Service's species account states: "Large snags and downed logs are believed to be important components of northern goshawk foraging habitat because such features increase the abundance of major prey species (Reynolds and others 1992)." AR 6390. The northern goshawk may therefore be significantly affected by the unlimited removal of large trees and dead or downed material.

The Forest Service also acknowledges that the Project "will result in [California spotted owl] nesting habitat being changed over to foraging habitat," which is potentially significant given the ongoing decline of the California spotted owl population, and the importance of large trees and snags to the species. AR 11806.[8] Furthermore, the Forest Service species account for the California spotted owl highlights their need for complex habitat including "mature overstory with average [diameter at breast height ("dbh")] exceeding 24 inches. . .[and a] densely stocked stand with basal areas averaging in excess of 190 ft2, with none less than 160 ft2", which the Project (with an approved target basal area of 80 ft2) will threaten. AR 6360. In addition, a study in 2014

[8] The Decision Memo also states that "in November 2019, the U.S. Fish and Wildlife Service issued a finding that it is not warranted at this time to list the California spotted owl as endangered or threatened." AR 11806. However, that November 2019 finding was challenged in federal court, and the U.S. Fish and Wildlife Service settled the case, agreeing to issue a new finding which recently determined that spotted owls in southern California warrant listing as "endangered." 88 Fed. Reg. 11600 (Feb. 23, 2022).

examining the effects of establishing a network of fuelbreaks on various species including the California spotted owl found, in response to fuel treatments, "the number of California spotted owl territories declined." AR 7200-7213. Likewise, the Project is inconsistent with the Forest Service's own *Conservation Strategy for the California Spotted Owls*, because it: 1) will allow trees greater than twenty-four inches dbh within CSO's "Home Range Cores" to be removed; 2) allow removal of far more hard snags than the recommended four to eight per acre; 3) does not include any measures to retain woodrat nests in the Project area; and 4) will result in a basal area per acre well below that needed by CSO (i.e. > 160 ft2 basal area per acre). AR 5896.

Several bat species are likely to be substantially affected, including the fringed myotis and pallid bat which roost during the day in large trees and snags. As CDFW explained in their comments: "Bats in southern California can be active year-round, however, all potential breeding species are most active between March 15 and September 15. Each bat species has unique habitat needs, such as specific gap size of cracks and seasonality. Direct impacts via habitat removal, noise, percussive vibration, human disturbance, and direct take would reasonably occur during the Project." AR 8450. The Wildlife Biological Evaluation ("BE") likewise acknowledges: "Relative to taking no action, in which snags, hollows, crevices, and exfoliating bark to roost may be created or enhanced by fire (Blakey et al. 2019), these types of structures [for bats] would largely be removed from the 755-acre project area." AR 11778. Therefore, bats may be significantly affected by the Project.

At least five sensitive plant species occur within or near the Project Area and will be adversely affected, including: Abrams' spineflower; Tehachapi or flax-like monardella; chickweed oxytheca; pale yellow layia, and Mt. Pinos larkspur. AR 5898. For example, chickweed oxytheca may be the species most vulnerable to the Project's impacts. The agency's species account states: "The primary threat to this species habitat is fuels and vegetation management that will occur across most of this species habitat

during the Plan period." AR 8407. The agency also noted that the Abrams' spineflower "has the potential to be impacted by chipping or placement of other organic material following fuel treatments." AR 8405.

The Decision Memo concludes that federally-listed and Forest Service sensitive plant species are not present in the Project Area based on surveys conducted in 2018 revealing no occurrence of such species. AR 11808. Accordingly, the Decision Memo summarily concludes that there is no likely effect on any such plant species. *Id.* However, the Botany Report on which the Decision Memo relies is void of any information regarding these surveys, other than that they were conducted "throughout the project area in the summer of 2018," making it impossible to evaluate their methodological sufficiency, and even includes some information that calls the surveys into question. AR 11737. For example, the Botany Report recognizes that "several occurrences" of at least one plant species, the chickweed oxytheca, across the eastern portion of the Project Area, is in the Consortium of California Herbaria Portal as recently as 2011. *Id.* This likely presence of this species was noted in comments in the record. See AR 8618-8619. The Botany Report also states that there will be additional surveys conducted before Project implementation because the species is very small and flowers in late summer. AR 11737. The need for additional surveys undermines the validity of relying on existing surveys to determine there are no impacts. Moreover, the same surveys were conducted for non-native species, and they failed to include observations of a highly abundant species, which calls into question the veracity of the survey methodology. AR 11738.

3. The Project Will Threaten a Potential Wilderness Area and the Sespe-Frazier IRA.

Finally, the Project will harm a potential wilderness and the Sespe-Frazier IRA to the extent that use of a CE is unlawful. 36 C.F.R. § 220.6(b)(1)(iv). As explained above, the Project includes several areas that Congress is considering for addition to the

National Wilderness Preservation System, which would add them to the Sespe Wilderness; and the Forest Service failed to disclose that. AR 11808. It also includes 311 acres of roadless area. The removal of numerous trees and shrubs will permanently harm or destroy these specially-recognized areas.

Therefore, the proposed action's effect on resource conditions is such that extraordinary circumstances exist, and the Forest Service's assessment of extraordinary circumstances, and its failure to complete an EA or an EIS before approving the Reyes Peak Project, violated NEPA and the APA. 5 U.S.C. § 706(2)(A).

III. The FWS Violated the Endangered Species Act.

The ESA requires the FWS to use the best available science in evaluating the Forest Service's biological assessment concerning the impacts of the Project on the endangered California condor and determining whether it concurs that the Project is or is not likely to adversely affect the species or its critical habitat. *See* 16 U.S.C. § 1536 (a)(2). A concurrence that the action is not likely to adversely affect a species is only appropriate when "effects on listed species are expected to be discountable, or insignificant, or completely beneficial." *Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* (March 1998), at 3-12. However, "[i]f the nature of the effects cannot be determined, benefit of the doubt is given to the species. Do not concur in this instance." *Id.* Moreover, if the FWS fails to "consider an important aspect of the problem," its conclusion is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n.,* 463 U.S. at 43.

On August 27, 2021, the FWS issued a letter to the Forest Service stating that the agency concurred with the Forest Service's determination that the Project is "not likely to adversely affect" the endangered California condor or their critical habitat. FWS Administrative Record ("FWS AR") 949. FWS recognized that the Project area "includes 193 acres of designated critical habitat for the California condor" in the Sespe-Piru Critical Habitat Unit, which is considered "critical for nesting and related year-long

activity." FWS AR 948, 531. It also recognized condor roosting habitat in the project area. FWS AR 949 ("The entire project footprint, 755 acres, is modeled as roosting habitat."); FWS AR 531-532 (Forest Service BA noting "roosting habitat suitability is moderate (western half of the action area) to high (eastern half of action area)"). However, it assumed that only a very small number of large trees will be logged in the Project area, and relied on this assumption to downplay impacts to roosting habitat. FWS AR 949 ("One of the project goals is to retain larger trees throughout the project area. These remaining large trees will continue to function as condor roosting habitat, thus continuing to provide roosting habitat for California condors following treatment."); FWS AR 532 ("Larger trees (greater than 24 inches diameter at breast height), like those favored by condors for nesting, would be retained unless they pose a hazard or are infected with dwarf mistletoe."); FWS AR 533 (Forest Service BA concluding "although tree or snag removal could eliminate potential roosting structures that would be considered temporary in nature, their removal would not have a measurable effect to condor conservation or to the effective recovery of the species").

The Project, as approved, actually authorizes logging of an unlimited number of large trees that contain any amount of dwarf mistletoe, as well as an unlimited number of snags. Nowhere does the Forest Service or FWS indicate or estimate the number of large trees or snags within the Project area that would meet these criteria and therefore be removed, and Plaintiffs have identified numerous such trees in the Project area, as explained above. Consequently, it was not possible for the FWS to reasonably conclude that "the project area will continue to provide roosting habitat for California condors in a manner similar to current conditions following treatment" and that such logging would not adversely affect condors or their critical habitat in light of the best available science showing the importance of large trees and snags to condors. FWS AR 949. Moreover, the FWS failed to consider that the Project will also involve thinning to reduce canopy cover and basal area per acre, and that opening up the canopy in or immediately adjacent

to suitable condor roosting trees will make the area more exposed and susceptible to wind, which can adversely impact roosting. *See* AR 5893.

The agency's failure to make projections on the potential effect of this logging on condors and their habitat violates the ESA's important mandates and would "eviscerate Congress' intent to 'give the benefit of the doubt to the species.'" *Conner v. Burford*, 848 F.2d at 1454. Accordingly, the FWS's "not likely to adversely affect" concurrence was not based on the best scientific and commercial data available as required by the ESA, 16 U.S.C. § 1536(a)(2), and was arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(A).

IV. The Forest Service Violated the Roadless Area Conservation Rule.

The Project fails to meet the Roadless Rule's limited exception to its prohibition on logging. The Roadless Rule "prohibits road construction, reconstruction, and timber harvest in inventoried roadless areas because [these activities] have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics." 66 Fed. Reg. at 3,244; *see also Los Padres ForestWatch v. United States Forest Serv.*, 25 F.4th 649, 655 (9th Cir. 2022) (explaining that an IRA "is an area that provide[s] large, relatively undisturbed landscapes," and therefore "[g]enerally, timber cutting, sale, or removal in [IRAs] are prohibited by the Roadless Area Conservation Rule"). The Roadless Rule contains a narrow exception to the Rule's overall prohibition on timber harvest—logging can be approved "infrequent[ly]" in inventoried roadless areas if limited to the "cutting, sale, or removal of *generally small diameter timber*." 66 Fed. Reg. at 3,273 (36 C.F.R. § 294.13) (emphasis added).

Here, within the Sespe-Frazier IRA, the Reyes Peak Project authorizes the logging of trees up to 24 inches in diameter, as well as even the largest trees in the Project area (i.e., up to 64 inches in diameter) if those trees contain dwarf mistletoe, or for vague safety reasons. AR 11800-11801. As discussed below, neither of these two categories of

trees qualifies as "generally small diameter timber," and consequently, the Project should be found in violation of the Roadless Rule.

A. Trees Over 24 Inches in Diameter Cannot Be Logged Within the Sespe-Frazier IRA.

The Decision Memo states: "Trees 24 inches diameter at breast height and larger would be retained within the project's inventoried roadless area *unless removal is needed for safety reasons or dwarf mistletoe infestations*." AR 11801 (emphasis added). The logging of trees over 24 inches diameter was not properly approved for the Sespe-Frazier IRA, however. Specifically, as explained below, the Regional Forester did not approve the logging of trees over 24 inches diameter within the Sespe-Frazier IRA, and it was therefore arbitrary and capricious for District Ranger Karina Medina to approve such logging in the Decision Memo.

As explained in the record, "the Chief [of the Forest Service] requires two levels of review for proposed projects in IRAs." AR 3687. "Depending on circumstances, either the Chief or Regional Foresters must review planned projects involving . . . the cutting, removal or sale of timber in IRAs." *Id*. Here, review by the Regional Forester was necessary (AR 3686), and on March 25, 2021, the Regional Forester signed off on the Reyes Peak Project's logging within the Sespe-Frazier IRA. AR 10472-10473.

Importantly, however, neither the briefing paper provided to the Regional Forester (AR 9752-9760), nor the document signed by the Regional Forester (AR 10472-73), make any mention of logging trees over 24 inches in diameter. Instead, those documents state that trees "less than 1-inch up to 23. 9-inch diameter at breast height class" would be logged while "[t]rees between the 24-inch and 64-inch diameter at breast height class would be retained." AR 9753; AR 10472 (authorizing cutting of "trees (<24 dbh) in the understory"). In short, the Regional Forester did not approve of logging in the Sespe-Frazier IRA of any tree greater than 24 inches diameter.

The Decision Memo relies on the Regional Forester's authorization in approving logging within the Sespe-Frazier IRA: "On March 25, 2021, Stephen J. Kuennen, Pacific Southwest Deputy Regional Forester signed a decision memorandum concurring that the Reyes Peak Forest Health and Fuels Reduction Project fits within 36 C.F.R. 294. 13(b)(I)(ii) and is consistent with the 2001 Roadless Rule." AR 11802. The Decision Memo is therefore arbitrary and capricious because it nowhere explains why it relies on, but then deviates from, the Regional Forester's IRA authorization. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43.

B. The Forest Service Has Failed to Justify the Logging of Trees Up To 24 Inches in Diameter Within the Sespe-Frazier IRA.

The Roadless Rule does not define the term "generally small diameter timber": "Because of the great variation in stand characteristics between vegetation types in different areas, a description of what constitutes 'generally small diameter timber' is not specifically included in this rule." 66 Fed. Reg. at 3,257. The Supreme Court has explained, however, that when "construing provisions . . . in which a general statement of policy is qualified by an exception, [courts] usually read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989). Thus, for projects like the Reyes Peak Project, the Roadless Rule's exception for the logging of "generally small diameter timber" must be construed narrowly in order to preserve the Rule's overall prohibition on logging.

The preamble to the Roadless Rule contains a number of statements to guide the Rule's narrow implementation. Most importantly for this case, the preamble explains that any logging "would focus on removing generally small diameter trees while leaving the overstory trees intact." 66 Fed. Reg. at 3258. Despite acknowledging this aspect of the Rule (AR 11809), and despite stating that thinning would only "remove trees from the understory to reduce ladder fuels" (AR 11801), the Forest Service nonetheless also states in its Decision Memo that logging would occur in the overstory to "reduce canopy

cover" (AR 11791) even though the Roadless Rule states that overstory trees are to be left "intact." *See also* AR 11825 ("the project will thin the forest canopy"); AR 11811 ("Thinning . . . will help reduce the ladder fuels as well as break up the canopy"). This Court should therefore find that the Reyes Peak Project is in violation of the Rule's narrow exception for "generally small diameter timber."

The Ninth Circuit's decision in *Los Padres ForestWatch* likewise provides guidance to help ensure the Roadless Rule's exception for logging is narrowly construed. *Los Padres ForestWatch* addressed a similar project in Los Padres National Forest that approved logging of trees up to 21 inches diameter in the Antimony IRA. *Los Padres ForestWatch*, 25 F.4th at 656. The Ninth Circuit found that the Forest Service "failed to articulate a satisfactory explanation—in the administrative record, in briefing, and at oral argument—for its determination that the 21-inch dbh trees that inhabit the Project area are 'generally small' within the meaning of the Roadless Rule." *Id*. at 657. The Court noted that "the [Los Padres National Forest] Land Management Plan's declaration that 24-inch dbh trees are large-diameter trees leads the Court to conclude that a 21-inch dbh tree is, at best, a medium-sized tree, not a 'generally small' tree as contemplated by the Roadless Rule." *Id*. at 658. Here, this shortcoming is especially pronounced because the Project focuses on medium sized trees (i.e., 12-24 inches diameter) by logging an average of 13.7 trees per acre in the 12-24 inch diameter range (AR 11810, Table 7) while only logging an average of 3.6 trees per acre in the 0-12 inch range (*id*.).[9] The Project's emphasis on trees in the 12-24 inch diameter range also demonstrates that even if the Roadless Rule's preamble is entirely ignored, and the word

[9] On remand from the Ninth Circuit, the district court in *Los Padres ForestWatch v. United States Forest Serv.* found that trees up to 21 inches diameter qualify as "generally small," noting "the significant majority of trees to be thinned are within the 0 to 2-inch DBH size class," and "[t]he Project focuses on . . . timber within the 0-14 inch DBH class range." No. 2:19-cv-05925-VAP-KSx, 2022 WL 18356465, at *7 (C.D. Cal. Dec. 5, 2022). Here, on the other hand, the Reyes Project will log zero trees within the 0 to 2-inch DBH size class and the Project focuses on trees in the 12-24 inch diameter range (AR 11810, Table 7) rather than the 0-14 inch class range. The district court's decision is now on appeal but no hearing date has yet been set by the Ninth Circuit.

"generally" broadly defined without taking into account the Roadless Rule's overall prohibition on logging,[10] the Reyes Peak Project still fails to comply with the Rule because the vast majority of trees the Project authorizes for logging are medium-sized trees rather than small trees.[11] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (arbitrary and capricious when an agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency").

V. The Forest Service Violated the Healthy Forests Restoration Act by Failing to Prepare and Submit Annual Reports to Congress.

HFRA requires the Forest Service to prepare annual reports containing "a description of all acres (or other appropriate unit) treated through projects carried out under [the HFRA CEs]." 16 U.S.C. § 6591b(g). The Forest Service must submit these annual reports to various Congressional committees as well as the Government Accountability Office. 16 U.S.C. § 6591b(g)(2). These reports were to be submitted "[n]ot later than 1 year after February 7, 2014, and each year thereafter" under 16 U.S.C. § 6591b, and "[n]ot later than 1 year after March 23, 2018, and each year thereafter" under 16 U.S.C. § 6591d. The Record lacks any evidence of a single annual report prepared or submitted. Accordingly, the Secretary of Agriculture and the Forest Service have violated 16 U.S.C. § 6591b and 16 U.S.C. § 6591d, and have unlawfully withheld or unreasonably delayed agency action and their actions were arbitrary and capricious under the APA. 5 U.S.C. § 706(1),(2).

[10] *See, e.g.*, Oxford English Dictionary Online (Dec. 2022), defining "generally" to mean "without reference to individuals or particulars"; "With respect to the majority of individuals or cases; for the most part; widely, extensively"; or "In most instances; usually, commonly; on most occasions; with the greatest frequency."

[11] This is further confirmed from a percentage point of view because AR 11810 (Table 7) shows that 79.2% of the logging will consist of medium-sized trees (12-24 inches diameter) while only 20.8% will consist of small trees (0-12 inches diameter). Moreover, these numbers do not take into account the unknown and unlimited number of large trees that are authorized for logging and which would even further demonstrate the Project's failure to primarily log small trees. See AR 11810 (Table 7, only accounting for trees 24 inches dbh or less).

VI. The Appropriate Remedy Is Vacatur and an Order Requiring Preparation of an EIS and BiOp Before the Forest Service Can Proceed with the Project.

Under the APA, "the normal remedy for an unlawful agency action is to set aside the action." *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007); 5 U.S.C. § 706(2)(A). Plaintiffs respectfully request that the Court 1) vacate and set aside the Forest Service's authorization of the Reyes Peak Project with instructions to prepare an EIS, and to comply with the Roadless Rule and HFRA, before the Forest Service can proceed with the Reyes Peak Project, and 2) vacate the FWS's concurrence letter and require preparation of a Biological Opinion regarding the California condor, before the Forest Service can proceed with the Reyes Peak Project.

An EIS is required because the Reyes Peak Project is a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C). An EIS must be prepared if there are "substantial questions" regarding whether the action may have significant impacts. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864–65 (9th Cir. 2005). This is a "low standard." *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). Many of the intensity factors requiring preparation of an EIS are triggered here, and the presence of any one of these factors may be sufficient to require preparation of an EIS. *See Nat'l Parks & Conservation Ass'n v. Babbitt,* 241 F.3d 722, 731 (9th Cir. 2001).

First, the significance of effects must be analyzed in the context of the Project's sensitive cultural and ecological region. *See* 40 C.F.R. § 1508.27(a); *Nat'l Parks*, 241 F.3d at 731 (acknowledging the setting, wildlife, and ecological significance of region). The sacred cultural resources, critical habitat, designated IRA, potential wilderness status, and unique sky island characteristics all render Pine Mountain a unique area deserving of more analysis in an EIS. *Envtl. Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 880 (9th Cir. 2022) (recognizing an ecologically rich area on which

wildlife rely and proximity to cultural resources to find this factor triggered), *petition for cert. filed*, No. 22-703 (Jan. 25, 2023).

Second, an EIS is required because the effects of the Project are "highly controversial." 40 C.F.R. § 1508.27(b)(4). Controversy is demonstrated when "a substantial dispute exists as to the size, nature, or *effect*" of the action. *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988) (emphasis in original). In response to scoping, the agencies received an "outpouring of public protest." *Nat'l Parks*, 241 F.3d at 736. Many of these comments alleged that the Project's logging and mastication activities may have significant impacts, as highlighted above. Yet, the Decision Memo dismissed impacts as less than significant. "Therein lay the controversy." *Id.* at 737.

Third, an EIS is required due to the uncertainty regarding impacts. 40 C.F.R. § 1508.27(b)(5). The most significant data gap here is the complete lack of assessment regarding how wildlife, cultural, and ecological resources will be impacted by the unlimited logging of large trees. The agency's "lack of knowledge does not excuse the preparation of an EIS; rather it requires the [agency] to do the necessary work to obtain it." *Nat'l Parks*, 241 F.3d at 733; *Envtl. Def. Ctr.*, 36 F.4th at 881("Guesswork by the agencies does not discharge their responsibilities under NEPA."). Fourth, the potential for adverse effects to the endangered California condor, as described herein, requires preparation of an EIS. *See* 40 C.F.R. § 1508.27(b)(9). Finally, it is reasonable to anticipate cumulative impacts from the Project, in combination with other past, present, and reasonably foreseeable logging activities in the region. *See, e.g.*, AR 11834; 40 C.F.R. § 1508.27(b)(7); *Ocean Advocates*, 402 F.3d at 868–70. Accordingly, this Court should order the Forest Service to prepare an EIS before it can proceed with the Project, in order to fully analyze impacts. *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1154 (9th Cir. 1998) (directing the Forest Service to prepare an EIS before deciding whether to proceed with a timber sale); *Envtl. Def. Ctr.*, 36 F.4th at 891.

Respectfully submitted this 10th day of March, 2023,

/s/ *Margaret Hall*

/s/ *Alicia Roessler*

Attorneys for Plaintiffs Los Padres ForestWatch, Keep Sespe Wild, American Alpine Club, and Earth Island Institute

/s/ *Justin Augustine*

Attorney for Plaintiffs Center for Biological Diversity, Patagonia Works, and California Chaparral Institute

/s/ *David Edsall*

Attorney for Plaintiff County of Ventura

/s/ *Carmen Brock*

Attorney for Plaintiff City of Ojai