No. 23-55801

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Los Padres ForestWatch, *et al.*,

Plaintiffs-Appellants,

vs.

United States Forest Service, *et al.*,

Defendants-Appellees,

APPEAL FROM DENIAL OF MOTION FOR SUMMARY JUDGMENT

By the United States District Court, Central District of California
Honorable John F. Walter, U.S. District Judge

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Plaintiffs Los Padres ForestWatch, Keep Sespe Wild Committee, Earth Island Institute, American Alpine Club, Center for Biological Diversity, and California Chaparral Institute state that they are non-profit entities that have not issued shares to the public and have no affiliates, parent companies, or subsidiaries issuing shares to the public. Plaintiff Patagonia Works is a private, closely held, outdoor apparel company that has not issued shares to the public and has no affiliates, parent companies, or subsidiaries issuing shares to the public.

Respectfully submitted this 22nd day of December, 2023,

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TABLE OF ACRONYMS

Acronym	Definition
CE	Categorical Exclusion
EA	Environmental Assessment
EIS	Environmental Impact Statement
FWS	U.S. Fish and Wildlife Service
HFRA	Healthy Forests Restoration Act
IRA	Inventoried Roadless Area
NEPA	National Environmental Policy Act
WUI	Wildland Urban Interface

INTRODUCTION

This case addresses the United States Forest Service's ("Forest Service") failure to protect one of the most beloved areas of Los Padres National Forest in southern California. Reyes Peak (elevation 7,514 feet) and its surrounding forest and chaparral[1] offer unparalleled opportunities for high-elevation recreation, such as camping, hiking, and rock-climbing, and are home to over 400 species of native plants and sensitive wildlife, including the endangered California condor. The area is also a sacred landscape to the Chumash people and contains an abundance of sensitive religious and cultural sites.

Despite the area's popularity and importance, the Forest Service plans to log the forest, including some of the largest trees (up to sixty-four inches in diameter), and masticate[2] the chaparral, including rare old-growth chaparral, on 755 acres of the Reyes Peak region. Moreover, when approving the Reyes Peak Forest Health and Fuels Reduction Project ("Reyes Peak Project" or "Project") under the National Environmental Policy Act ("NEPA"), the Forest Service did not prepare an environmental impact statement ("EIS"), or even an environmental assessment ("EA"). Instead, the agency relied on three "categorical exclusions" ("CEs") which, unlike an EIS or EA, do not require detailed analysis of a project's

[1] Chaparral is a unique shrubland ecosystem native to California.
[2] Mastication refers to the use of tractors or other heavy machinery to grind up native vegetation.

environmental impacts, nor consideration of alternatives that would lessen the project's harm. The Forest Service proceeded with the CEs despite the fact that over ninety-nine percent of the submitted comments raised serious concerns about the Project's impacts.

The Forest Service's reliance on CEs for this Project violates NEPA. CEs can only be used for projects that will not cause significant environmental impacts, either individually or cumulatively. 40 C.F.R. § 1508.4. CEs also cannot be used to approve a project when "extraordinary circumstances" exist. *Id*.; 36 C.F.R. § 220.6(a), (b). Here, the Forest Service failed to properly examine the Reyes Peak Project's potential harm to sensitive religious or cultural sites, a protected roadless area (the Sespe-Frazier Inventoried Roadless Area), and a potential wilderness area. The Forest Service's cultural impacts analysis, for example, entirely ignores evidence submitted by Plaintiffs, Tribes, and ethnohistory experts.

The Forest Service also contravened the requirements of the CEs found in the Healthy Forests Restoration Act ("HFRA") at 16 U.S.C. sections 6591b, 6591d. Specifically, the agency failed to: (1) ensure protection of "old-growth and large trees," (2) develop the Project through a collaborative process, and (3) demonstrate that the Project complies with the CEs' location requirements. *See id*. at §§ 6591b(b), (c), 6591d(b), (c).

Finally, the Forest Service's approval of the Project violates 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).[3] Approximately forty percent of the Reyes Peak Project occurs within the Sespe-Frazier Inventoried Roadless Area. The Roadless Rule contains only a narrow exception for the logging of "generally small diameter timber." 36 C.F.R. § 294.13; 66 Fed. Reg. at 3,273. Here, the Forest Service violated that exception by authorizing the logging of trees up to sixty-four inches in diameter in the Sespe-Frazier Inventoried Roadless Area.

The District Court rejected Plaintiffs' challenges, concluding that the Forest Service complied with NEPA, HFRA, and the Roadless Rule. That judgment should be reversed because it misapplied the law and ignored key facts in the administrative record. Plaintiffs respectfully ask this Court to vacate and set aside the Forest Service's approval of the Reyes Peak Project.

[3] 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. *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 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.

STATEMENT OF JURISDICTION

Jurisdiction in the District Court existed under 28 U.S.C. section 1331 because Plaintiffs-Appellants' claims are based on federal law. Pursuant to 28 U.S.C. section 1291, this Court has jurisdiction over the appeal of the District Court's final order granting summary judgment to Defendants-Appellees and denying summary judgment to Plaintiffs-Appellants. The District Court entered its opinion on July 19, 2023 (1-ER-4), and judgment on July 24, 2023 (1-ER-2). Plaintiffs-Appellants filed a timely appeal on September 19, 2023, pursuant to Federal Rules of Appellate Procedure 4(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Forest Service violate NEPA when it excluded the Reyes Peak Project from standard environmental review despite the Project's potential impacts to religious and cultural sites, the Sespe-Frazier Inventoried Roadless Area, and potential wilderness (36 C.F.R. § 220.6(a), (b))?

2. Did the Forest Service violate HFRA when it excluded the Reyes Peak Project from standard environmental review despite the failure to ensure retention of old-growth and large trees, collaborate with stakeholders, and limit tree removal and chaparral mastication to certain locations (16 U.S.C. §§ 6591b, 6591d)?

3. Did the Forest Service violate the Roadless Rule when the agency authorized the logging of trees up to sixty-four inches in diameter in the Sespe-Frazier Inventoried Roadless Area even though the Rule only permits the logging of "generally small diameter timber" (36 C.F.R. § 294.13; 66 Fed. Reg. at 3,273)?

STATEMENT OF ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, pertinent statutory, regulatory, and other provisions are set forth in an addendum attached to this brief as Attachment A.

STATEMENT OF THE CASE

I. Legal Background

A. The National Environmental Policy Act and the Healthy Forests Restoration Act

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a) (1978).[4] 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

[4] 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 apply and are cited in this brief. *See* 85 Fed. Reg. 43,304 (July 16, 2020) (stating that the NEPA regulations addressed in the rulemaking "apply to any NEPA processes begun after September 14, 2020").

"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).[5]

NEPA requires federal agencies to prepare, and circulate for public comment, a detailed 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 EA, which must provide sufficient evidence and analysis for determining whether an action has significant impacts. 42 U.S.C. § 4336(b); 40 C.F.R. § 1508.9(a)(1). In undertaking NEPA analysis, an agency must consider direct, indirect, and cumulative effects. 40 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.*, 42 U.S.C. § 4332(C). The analysis of alternatives is "the heart" of NEPA review. 40 C.F.R. § 1502.14.

In narrow situations, neither an EIS nor an EA is required, and federal agencies may instead invoke a "categorical exclusion" from NEPA. 40 C.F.R. §

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

1501.4(a). Regulatory CEs are 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. The Forest Service's CEs are found at 36 C.F.R. § 220.6.

The Forest Service can only invoke a CE if no "extraordinary circumstances" exist. 40 C.F.R. § 1508.4. The Forest Service's regulations contain a list of resource conditions that must be considered in evaluating the presence of "extraordinary circumstances," and these include "American Indians and Alaska Native religious or cultural sites" as well as "Inventoried roadless area or potential wilderness area." 36 C.F.R. § 220.6(b)(1). If there is substantial evidence that extraordinary circumstances exist, use of a CE is prohibited. *Cal. v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002).

In addition to the Forest Service's regulatory CEs, Congress has enacted statutory CEs that the Forest Service may use in limited circumstances to meet the agency's NEPA obligations. In this case, the Forest Service relied on 16 U.S.C. sections 6591b and 6591d. These statutory CEs contain specific criteria that the Forest Service must adhere to in order to use the CEs. *See* 16 U.S.C. §§ 6591b(b), (c), (d), 6591d(b), (c), (d). For example, both 16 U.S.C. section 6591b and 16 U.S.C. section 6591d require the Forest Service to "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." *Id*. at §§ 6591b(b)(1)(A), 6591d(b)(1)(A).

B. The Roadless Area Conservation Rule

The Roadless Rule was established by the Forest Service in 2001 "to protect and conserve inventoried roadless areas on National Forest System lands." 66 Fed. Reg. at 3,244. Inventoried roadless areas "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.

The Roadless Rule recognizes logging as one of the activities with 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. Accordingly, to maintain the integrity of inventoried roadless areas, "[g]enerally, timber cutting, sale, or removal . . . are prohibited by the Roadless Area Conservation Rule." *Los Padres ForestWatch v. U.S. Forest Serv.*, 25 F.4th 649, 655 (9th Cir. 2022).

A "rare" exception to the Rule's overall logging prohibition exists for the "cutting, sale, or removal of generally small diameter timber." 36 C.F.R. § 294.13;

66 Fed. Reg. at 3,258, 3,273. In promulgating the Roadless Rule, the Forest Service stated that "[b]ecause 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 [the Roadless] rule." 66 Fed. Reg. at 3,257. Instead, "[s]uch determinations" are to be "guided by ecological considerations" such as the Rule's "intent . . . to limit the cutting, sale, or removal of timber to those areas that have become overgrown with smaller diameter trees," and "leaving the overstory trees intact." *Id*. at 3,257 and 3,258.

II. The Reyes Peak Project Administrative Proceedings

On May 27, 2020, the Forest Service announced the Reyes Peak Project in Los Padres National Forest. 3-ER-368. Located in the coastal mountains of southern California, in Ventura County, the Project proposed to log conifer forest, including large trees up to sixty-four inches in diameter, and to masticate chaparral, including old-growth chaparral that is important to numerous species. 3-ER-370-396.

The Project was initiated in the wake of Executive Order 13855, which directed the Forest Service to sell 3.8 billion board feet of timber. To meet this goal, Forest Service memos encouraged agency staff to invoke CEs and "explore creative methods" to avoid NEPA environmental review under EISs or EAs. 3-ER-397.

Prior to May 27, 2020, Plaintiffs and most community stakeholders, including independent scientists, industry groups, conservation organizations, and local property owners, were unaware of the Project, and thus unable to participate in the Project's development.[6] *See* 2-ER-224-225. After learning of the proposed Project, Plaintiffs, and many other organizations and individuals, submitted comments opposing the Project—of the approximately 16,000 comments submitted, over ninety-nine percent were opposed. *See* 2-ER-109-223. This overwhelming public opposition came from diverse entities, including: leaders from local Native American groups (2-ER-233-235; 2-ER-246; 3-ER-356-357); a group of ethnohistorians and archaeologists (2-ER-236-240); University of California Professor Carla D'Antonio (3-ER-341-347); Ojai Mayor Johnny Johnston (3-ER-362-363); Ventura County Supervisors Linda Parks (3-ER-365-366), Matt LaVere (2-ER-105), Carmen Ramirez (2-ER-101-102), and Steve Bennett (3-ER-359-361); State Senator Hannah-Beth Jackson (3-ER-364); Congressmembers Julia Brownley (3-ER-358) and Salud Carbajal (3-ER-367); over fifty local businesses (2-ER-241-245); and seventy environmental organizations (2-ER-247-253).

Plaintiffs' comment letters, as well as those submitted by independent

[6] The Project was not listed in the Forest Service's quarterly Schedule of Proposed Actions ("SOPA") prior to the public comment period. The SOPA is the primary means by which the Forest Service notifies the public of proposed activities.

scientists, discussed how the Project would harm the forest, chaparral, and cultural sites. *See, e.g.*, 3-ER-255-340; 3-ER-348-353; 3-ER-354-355. Moreover, opposition comments from several Native American Tribes identified the presence of valuable religious and cultural sites that would be harmed by the Project. *See, e.g.*, 2-ER-233-235. Many letters also explained why the Project's location was misguided—forty percent of the Project area is within the Sespe-Frazier Inventoried Roadless Area, and approximately thirty-four percent of the Project area is being considered for addition to the Sespe Wilderness, a protected area where logging would be entirely prohibited. 3-ER-306, 339. Comment letters also requested that an EA or EIS be conducted, especially in light of the fact that the Project allowed the logging of some of the biggest and oldest trees in the area. *See, e.g.*, 3-ER-256.

Despite the overwhelming opposition, on September 30, 2021, the Forest Service signed its Decision Memo approving the Reyes Peak Project. 2-ER-61.

III. The District Court Proceedings

On April 27, 2022, Plaintiffs challenged the Reyes Peak Project in the Central District of California. 3-ER-423. Plaintiffs moved for summary judgment on March 10, 2023, and Federal Defendants opposed and filed a cross-motion for summary judgment. 3-ER-431-432. After conclusion of briefing, the District Court granted summary judgment for Defendants on July 19, 2023. 3-ER-435-436. The

District Court entered final judgment July 24, 2023.[7] 3-ER-436.

SUMMARY OF THE ARGUMENT

The Forest Service's authorization of the Reyes Peak Project violates NEPA, HFRA, and the Roadless Rule.

The Forest Service violated NEPA and HFRA when it relied on CEs to approve the Reyes Peak Project. First, the use of CEs was improper due to the potentially significant impacts, i.e., "extraordinary circumstances," caused by the Project. 40 C.F.R. § 1508.4; 36 C.F.R. § 220.6(a),(b). Specifically, the Forest Service ignored substantial evidence in the record showing the potential for significant impacts to Native American religious and cultural sites, a roadless area, and a potential wilderness area. *Id*.

In addition, the HFRA CEs contain specific criteria that have not been met in this case. Nowhere did the Forest Service identify where old-growth exists in the Project area, and the agency failed to account for the Project's exceptions that authorize the logging of an unknown number of large trees; consequently, the Forest Service failed to adequately explain how the Reyes Peak Project will "maximize the retention of old-growth and large trees." 16 U.S.C. §§ 6591b(b)(1)(A), 6591d(b)(1)(A). The HFRA CEs also mandate that the Forest

[7] Plaintiffs-Appellants submitted standing declarations during the district court proceeding which demonstrate Plaintiffs-Appellants' standing to bring this case. 3-ER-431.

Service use a collaborative process when developing a project. 16 U.S.C. §§ 6591b(b)(1)(C), 6591d(b)(1)(C). That did not happen for the Reyes Peak Project because the Forest Service neglected to include Plaintiffs and other stakeholders in the critical initial stages of project development and made no changes to the Project to address Plaintiffs' concerns. Finally, the Forest Service failed to properly locate the Project. The agency nowhere explained how the Project will in fact be located "in Condition Classes 2 or 3 in Fire Regime Groups I, II, or III." 16 U.S.C. §§ 6591b(c)(2), 6591d(c)(2)). Moreover, the evidence in the record shows that chaparral belongs in Fire Regime Group IV, and therefore the chaparral part of the Project is not eligible for the HFRA CEs. *Id*.

The Forest Service also violated the Roadless Rule, which prohibits logging in inventoried roadless areas unless the logging is limited to "generally small diameter timber." 36 C.F.R. § 294.13; 66 Fed. Reg. at 3,273. Here, forty percent of the Reyes Peak Project would occur in the Sespe-Frazier Inventoried Roadless Area, where the Forest Service has authorized the logging of trees up to sixty-four inches in diameter. Because the Forest Service wrongly focused on medium and large-sized trees, rather than small trees, the agency violated the Roadless Rule.

ARGUMENT

I. Standard of Review

Appeals courts "review de novo the district court's grant of summary

judgment upholding an agency decision." *N. Alaska Env't Ctr. v. U. S, Dep't of Interior*, 965 F.3d 705, 712 (9th Cir. 2020). Federal agency decisions are reviewed pursuant to the Administrative Procedure Act ("APA"), which "requires a court to 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." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc).

In evaluating agency decisions, courts must 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.* "Further, an agency's decision can be upheld only on the basis of the reasoning in that decision." *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997).

II. The Forest Service Violated the National Environmental Policy Act and the Healthy Forests Restoration Act.

The Forest Service's reliance on CEs and failure to prepare either an EIS or EA for the Reyes Peak Project was improper under NEPA and HFRA for two

primary reasons. First, the Forest Service abdicated its NEPA responsibilities by failing to undertake an adequate analysis of the Reyes Peak Project's impacts to religious and cultural sites, the Sespe-Frazier Inventoried Roadless Area, and a potential wilderness area. Second, the Forest Service violated the requirements of the statutory CEs because the Forest Service failed to demonstrate that the Reyes Peak Project (1) would "maximize the retention of old-growth and large trees," (2) used a collaborative process to develop the Project, and (3) was properly located. *See* 16 U.S.C. §§ 6591b, 6591d.

A. The Forest Service's "Extraordinary Circumstances" Determination Is Arbitrary and Capricious.

Before the Forest Service can forego preparation of an EA or EIS under NEPA, the agency "must determine that there are no extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 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 specific "resource conditions" to be considered in evaluating the presence of extraordinary circumstances, including "American Indians and Alaska Native religious or cultural sites" and "Inventoried roadless area or potential wilderness area." 36 C.F.R. § 220.6(b)(1). There is no required showing that there *will* be a significant impact on such resource conditions; rather, it is the "degree of the *potential effect* of a proposed action . . . that determines whether extraordinary circumstances exist." 36 C.F.R. § 220.6(b)(2) (emphasis

added). "If . . . it is uncertain whether the proposed action may have a significant effect on the environment, [the Forest Service must] prepare an EA," and "[i]f . . the proposed action may have a significant environmental effect, [the agency must] prepare an EIS." 36 C.F.R. § 220.6(c).

Here, the Forest Service's "extraordinary circumstances" determination (2-ER-49-57) is arbitrary and capricious because the agency (1) ignored substantial information showing the presence of religious or cultural sites that could be harmed by the Project; (2) failed to address whether the logging of large trees could harm the Sespe-Frazier Inventoried Roadless Area; and (3) overlooked, and thus never addressed, the fact that potential wilderness would be impacted by the Project.

1. The Forest Service Arbitrarily Concluded That No Religious or Cultural Sites are Present in the Project Area.

In its Decision Memo, the Forest Service summarily concluded: "Based on discussions with federally recognized tribes and agency research and analysis, there are no Native American religious or cultural sites within the project area." 2-ER-57. The Forest Service failed to provide any analysis or supporting information to substantiate this conclusion. Additionally, the agency's conclusion is contradicted by overwhelming evidence in the record. Accordingly, the Forest Service's failure to meaningfully consider and address the Project's potential

effects on religious or cultural sites precludes the use of a CE here. *See* 36 C.F.R. § 220.6(b)(1)(vi).

The record is replete with evidence of religious or cultural sites, and readily demonstrates that the Project will likely harm such sites. Tribes submitted extensive evidence of plants, artifacts, discrete geographic structures, and biotic areas in the Project area that carry ceremonial, medicinal, and religious importance and are threatened by the Project. Specifically, the Coastal Band of the Chumash Nation described the Project's alteration of the landscape as an "assault on our Chumash lifeways." 2-ER-234. That letter further states: "Our people use this area for gathering medicine, seeking guidance from Creator through prayer as well as for mental and physical health." 2-ER-233. The Tribe pointed to evidence of grinding bowls that can be easily destroyed by mechanical equipment, and medicinal plants in the Project area. 2-ER-234. The letter also identified old-growth trees as "sacred places" and explains that chaparral "play significant roles in our creation stories." 2-ER-234-235. Likewise, the Barbareño/Ventureño Band of Mission Indians stated that Reyes Peak "is a well-known central observation point, saturated with cultural and ceremonial significance." 3-ER-357.

In addition to the extensive information presented by Tribes, a group of eleven ethnohistorians and archaeologists submitted a letter stating there are "numerous historical and ethnohistoric records attesting to the cultural significance

of the area." 2-ER-236. Specifically, their letter cites the field notes of John P. Harrington which are considered "the richest source of Native Californian ethnohistoric material concerning the [Los Padres National Forest]." *Id*. These notes confirm Pine Mountain[8] as a sacred area that is "significant to the spiritual and religious beliefs of the Ventureño Chumash." 2-ER-237. The letter states Pine Mountain is mentioned in "ceremonial songs and locations invoked in prayers." *Id.* Moreover, the letter provides, "trees for the Chumash can be shrines in-and-of themselves." *Id.* The field notes cited in this comment letter also describe traditional trails that run directly through the Project area. *Id*. These trails "incorporated ritualized forms of prayer, offerings, trail shrines as well as possessing potent cosmographic and spiritual significance." *Id.* As the letter points out, the Project neglected to identify "any Native trail system and therefore will likely result in the damage to, or loss of, a unique and significant heritage resource." *Id*. The Forest Service's conclusion that no cultural sites exist in the Project area is thus arbitrary and capricious because the conclusion "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *see also W. Watersheds Project v. U.S. Forest Serv.*, No. CV-11-09128-PCT-NVW, 2012 WL 6589349, at *16 (D. Ariz. Dec. 17, 2012), aff'd, 603 F. App'x 612 (9th

[8] Pine Mountain is the name of the ridgeline along which Reyes Peak is the highest point.

Cir. 2015) (holding the Forest Service could not proceed with a CE because it failed to "explain why and how [the Project] will not affect [cultural resources]").

The Forest Service's conclusion is also arbitrary because it was based solely on consultation with federally-recognized tribes. 2-ER-57. As the comments submitted by the Wishtoyo Chumash Foundation ("Wishtoyo") explain, the tribal entities associated with Pine Mountain "are not interchangeable and culture bearers in each tribal group hold unique traditional knowledge relevant to cultural sites in the Project area." 2-ER-227. In other words, consultation with only federally-recognized tribes is not sufficient to determine the Project's potential effect on cultural sites. *See also Winnemem Wintu Tribe v. U.S. Dept. of Interior*, 725 F. Supp. 2d 1119, 1134 (E.D. 2010) (recognizing cultural and religious interests regardless of tribal status).

The resources identified above qualify as religious or cultural sites that should have been addressed by the Forest Service. This Court has recognized in slightly different contexts that areas, plants, mountain peaks, and landscapes can be cultural resources. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of Interior,* 608 F.3d 592 (9th Cir. 2010) ("*Te-Moak Tribe*"). In *Te-Moak Tribe*, plaintiffs challenged the Bureau of Land Management's ("BLM's") approval of an exploratory mining project, and this Court held that BLM failed to consider cumulative impacts to cultural resources in its EA. *Id*. at 602-07. This Court

explained that a Tribe's "religion and culture is inextricably linked to the landscape of the area," and noted that BLM had "designate[d] two sites within the project area as 'properties of cultural and religious importance' . . . (1) Horse Canyon and (2) the top of Mount Tenabo and the 'White Cliffs' of Mount Tenabo." *Id*. at 597. The Court also discussed that the project area "contains many pinyon pine trees, a source of pine nuts that were once a key component of the Western Shoshone diet and remain a focal point of Western Shoshone culture and ceremony." *Id*.

Those resources are similar in nature to the resources in this case—the peak of Mount Tenabo is akin to Pine Mountain, as both are used for religious and ceremonial purposes; the pinyon pine is akin to the numerous medicinal plants identified in the Project area, including dwarf mistletoe; and finally, similar to the Te-Moak's relationship with Mount Tobo, the Chumash are ancestrally connected to Pine Mountain and Reyes Peak. *See* 2-ER-233-235; 3-ER-356-357; 2-ER-236-240. Furthermore, the Wishtoyo comments define cultural resources as including "former village sites, work sites, sacred sites . . . traditional gathering sites for ceremonial plants, medicine plants, food plants, basketry plants, and other material culture plants." 2-ER-227. Such resources are present in the Project area, as demonstrated above. The Forest Service has provided no reasonable basis for

ignoring the presence of such sites.[9]

Moreover, the Forest Service has previously acknowledged that "potential management concerns" exist with respect to cultural resources in the Reyes Peak Project area. 3-ER-402. 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 the fuelbreak that is now part of the Reyes Peak Project. *Id*.

The Decision Memo's conclusion that no religious or cultural sites are present is overwhelmingly contradicted by the record. In ignoring that evidence, the Forest Service thereby "failed to conduct any analysis that could possibly allow it to be certain, as required by the Forest Service [extraordinary circumstances] policy, that no significant effect would occur." *W. Watersheds Project*, 2012 WL 6589349, at *16. This Court should therefore find the Forest Service's

[9] The Forest Service prepared a "Cultural Resource Report" (2-ER-86-97), but it too provides no support for the agency's "extraordinary circumstances" determination with respect to religious or cultural sites. The Report contains no discussion of the religious or cultural sites identified by Tribes and ethnohistorian experts. For example, there is no mention of trails or trail shrines, medicinal plants, Pine Mountain, or Reyes Peak. There is no discussion of impacts to chaparral, grinding bowls, legacy trees, or other gathering places. Accordingly, the Cultural Resources Report cannot support the Forest Service's conclusion regarding the absence of cultural sites. *See W. Watersheds*, 2012 WL 6589349, at *16 (finding that the "Archaeological Survey underlying the Decision Memo, summarily dismissed the effect of grazing," and that "nothing in the administrative record hints that the Forest Service made any reasoned determination on the issue [of cultural sites]").

extraordinary circumstances determination arbitrary and capricious with respect to religious or cultural sites.

2. The Forest Service Failed to Analyze the Impact of Removing Large Trees in the Sespe-Frazier Inventoried Roadless Area.

The Forest Service's decision to exclude the Project from standard environmental review was improper due to its location within an inventoried roadless area. The Decision Memo's extraordinary circumstances determination regarding the Sespe-Frazier Inventoried Roadless Area rests on the assertion that the Roadless Rule allows for "generally small diameter timber" to be cut and the assumption that no trees greater than twenty-four inches in diameter will be removed. 2-ER-54 ("[N]early half of the trees in the project area are 24-inch dbh or greater. None of these trees will be removed."). The Project contains two broad exceptions to this twenty-four inch diameter limit, however, which allow for an unknown number of large trees to in fact be logged—trees "impacted" or "infested" by dwarf mistletoe may be logged, as well as trees deemed necessary for removal "for overall forest health." *See* 2-ER-44-45. The Decision Memo does not state how often these exceptions may be used or even how they are defined.

Dwarf mistletoe is a native parasitic plant that grows primarily on Jeffrey and ponderosa pines in the area. *See* 3-ER-337 (showing a picture of dwarf mistletoe in the Project area, as seen on a Jeffrey pine tree). Dwarf mistletoe is

associated with increased bird diversity and is a critical component of "healthy diverse forest ecosystems." 3-ER-411. For example, when dwarf mistletoe is present on a large tree, it can help cause cavities to form in the tree, which in turn creates habitat for wildlife. *See, e.g.,* 3-ER-403 ("The number of cavity-nesting birds detected also was positively correlated with both dwarf-mistletoe levels and number of snags."). Thus, logging *any* large tree that contains dwarf mistletoe can be harmful to the biodiversity of the forest, and here, the Project authorizes an unknown number of such trees to be logged.

Logging in roadless areas is environmentally significant because roadless areas have special attributes such as water resources, soils, wildlife habitat, and recreation opportunities, that possess independent environmental significance. *Smith v. U.S. Forest Serv.*, 33 F.3d 1072, 1078–79 (9th Cir. 1994). Because the Forest Service did not include a flat prohibition against logging large trees in the Sespe-Frazier Inventoried Roadless Area, and because it is unknown to what degree such logging will occur, the Forest Service was required, at minimum, to acknowledge and analyze the potential effect of logging large trees in the Sespe-Frazier Inventoried Roadless Area. The Forest Service failed to do so, and therefore its extraordinary circumstances determination "entirely failed to consider an important aspect of the problem," and "offered an explanation . . . that runs

counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

3. The Forest Service Arbitrarily Concluded that No Potential Wilderness is Present in the Project Area.

The Decision Memo did not evaluate the Project's impact on potential wilderness, instead claiming that none exists in the Project area. 2-ER-53 ("No potential wilderness areas are identified within the forest plan for the project area."). To the contrary, the Project area does include potential wilderness. As Plaintiffs informed the Forest Service: "[A]s of the writing of this [comment] letter, the U.S. House of Representatives has already approved two pieces of legislation that would designate approximately 34% of the Project Area (which roughly coincides with the Sespe-Frazier Inventoried Roadless Area in the area) as additions to the Sespe Wilderness." 3-ER-306; *see also* 3-ER-339 (showing a map of the potential wilderness). Once again, the Forest Service has "entirely failed to consider an important aspect of the problem," and "offered an explanation . . . that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

B. The Forest Service Failed to Comply with the Requirements of the Healthy Forests Restoration Act Categorical Exclusions.

Congress limited the use of the HFRA CEs to a narrow set of circumstances. *See* 16 U.S.C. §§ 6591b(b), (c), (d), 6591d(b), (c), (d). The Reyes Peak Project

falls short of three of those standards. First, the Forest Service failed to rationally explain how the Project will "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." *Id*. at §§ 6591b(b)(1)(A), 6591d(b)(1)(A). Second, the Forest Service did not develop and implement the Project through a collaborative process. *Id*. at 16 U.S.C. §§ 6591b(b)(1)(C), 6591d(b)(1)(C)). Third, the Forest Service has not demonstrated that the Project is located in either the "wildland urban interface" or an area considered to be "in Condition Classes 2 or 3 in Fire Regime Groups I, II, or III." *Id*. at §§ 6591b(c)(2), 6591d(c)(2).

1. The Forest Service Failed to Rationally Explain How the Reyes Peak Project "Maximizes 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."

a. Old-Growth

In order to "maximize the retention of old-growth," as required by the HFRA CEs (16 U.S.C. §§ 6591b(b)(1)(A), 6591d(b)(1)(A)), the Forest Service must first identify *where* old-growth stands exist in the Reyes Peak Project area. *See, e.g.*, *Native Ecosystems Council v. Marten*, 807 F. App'x 658, 661 (9th Cir. 2020) (discussing how the Forest Service determined where old-growth existed in the project area). That never occurred in this case. In the agency's Silvicultural Report, the Forest Service defines old-growth as "old forests, which often contain several canopy layers, variety in tree sizes, species, decadent old trees, and

standing and dead woody material." 2-ER-81. The Report, however, did not assess whether such conditions exist in the Project area. Likewise, nowhere in the Project's Decision Memo, nor anywhere else in the record, did the Forest Service identify where old-growth does, or does not, exist in the Project area.

Several unpublished Ninth Circuit cases underscore the Forest Service's failure in this case. In *Native Ecosystems Council v. Marten*, 807 F. App'x at 661, this Court relied on the Forest Service's "Old Growth Report" that "covered the entire Project area and was conducted for the specific purpose of assessing old-growth conditions" when determining that the Forest Service complied with the HFRA CE found at 16 U.S.C. § 6591b. Similarly, in *Native Ecosystems Council v. Erickson*, 330 F. Supp. 3d 1218, 1245 (D. Mont. 2018), the district court explained that the Forest Service "identified units with possible old growth, and propose[d] no harvest or treatment in old growth or potential old growth stands," and this Court affirmed, stating: "In this case, the Forest Service concluded, based on scientific research and analysis by its experts, that no old growth would be removed in conjunction with the Project." *Native Ecosystems Council v. Erickson*, 804 F. App'x 651, 654 (9th Cir. 2020). And finally, in *Friends of Rapid River v. Probert*, 816 F. App'x 59, 63 (9th Cir. 2020), the Forest Service met its old-growth obligations "in relying on legacy stand exams and photographs in lieu of site visits in order to verify old growth."

In each of the above cases, the Forest Service identified where old-growth existed within the project area, and then explained how that old-growth would be addressed (such as no harvest occurring in the old-growth stands). In this case, on the other hand, the Forest Service did not complete the essential first step of identifying old-growth in the Reyes Peak Project area. Consequently, because "an agency's decision can be upheld only on the basis of the reasoning in that decision," and because here, "the agency has . . . entirely failed to consider an important aspect of the problem," the Reyes Peak decision is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

In the Reyes Peak Decision Memo, the Forest Service asserts that it met its obligations with respect to old-growth because "larger-diameter trees between 24-inch and 64-inch diameter breast height will be retained within the conifer forests in the project area." 2-ER-75. This assertion fails, however, for two reasons. First, retaining large trees is not the same as retaining old-growth—the HFRA CEs mandate that the Forest Service "maximize the retention of old-growth *and* large trees . . . ." 16 U.S.C. § 6591b(b)(1)(A) (emphasis added). Second, the assertion contradicts the agency's definition of old-growth for the area in question. Specifically, even if it were true that all trees greater than twenty-four inches in diameter will be retained (as discussed, supra, it is not true), the fact remains that old-growth is not merely large trees; instead, it consists also of the trees that make

up the "several canopy layers," the "variety in tree sizes," and the "standing and dead woody material." *See* 2-ER-81. The Forest Service nowhere explains how logging of trees less than twenty-four inches in diameter will ensure that any old-growth stands in the Project area will retain their old-growth character. For instance, there is no explanation of whether or how the stands will continue to contain multiple canopy layers once trees under twenty-four inches in diameter are cut. Consequently, the assertion made in the Decision Memo regarding large trees provides no basis on which the Forest Service can rely to demonstrate that old-growth retention will be maximized.

Finally, large trees that help make up an old-growth stand—such as the "decadent old trees" referenced in the agency's definition of old-growth (2-ER-81)—will not necessarily be protected in the Reyes Peak Project because the Forest Service seeks to log trees greater than twenty-four inches in diameter "if the trees are impacted by dwarf mistletoe." 2-ER-44. As discussed above, dwarf mistletoe is a native parasitic plant that helps support "healthy diverse forest ecosystems" and is associated with increased bird diversity. 3-ER-411. When dwarf mistletoe is present on a tree, it can cause cavities to form in the tree, thereby creating the kind of decadent features found in old-growth stands. *See, e.g.*, 3-ER-413 ("Decadent stands containing large diameter snags, trees with broken tops, diseased trees in which cavities frequently form"). Because large trees with mistletoe can be

important for maintaining the old-growth character of a stand, the Forest Service must explain why logging such trees is consistent with the HFRA CEs. The agency has not done so, and this is yet another reason the Forest Service's conclusions regarding old-growth are arbitrary and capricious.

b. Large Trees

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." 2-ER-54; *see also* 2-ER-55 ("[N]o trees in the greater than 24-inch classes are planned to be removed."). In fact, however, the Project authorizes the removal of an unknown number of large trees through two broad exceptions that in effect swallow the asserted twenty-four inch limitation. 2-ER-44-46.

The first exception authorizes trees as large as sixty-four inches in diameter to be cut if the trees are "impacted by dwarf mistletoe." 2-ER-44. Nowhere did the Forest Service analyze or explain how many large trees fall within this exception, nor did the agency identify what criteria will be used to determine if a tree is "impacted." The second exception likewise allows for an unknown number of large trees to be removed, this time for "overall forest health." 2-ER-44. Again, the Forest Service did not identify or analyze the number or location of large trees that would be logged pursuant to this exception, nor did it explain how "overall forest

health" would be measured. This vague, open-ended language casts such a broad exception that its application could allow for the Forest Service to negate the twenty-four inch dbh limit on an *ad hoc* basis, potentially resulting in the removal of hundreds of large trees. This is a far cry from the Forest Service's claim that no large trees are planned for removal.

Because these two exceptions authorize the logging of an unknown number of large trees, the Forest Service must explain how the Project will nonetheless "maximize[] the retention of . . . large trees." The agency has not done so. Moreover, because these two exceptions preclude the Forest Service from knowing how many large trees will remain in the Project area after the Project, the Forest Service lacks necessary information to ensure compliance with the HFRA CEs. For these reasons, the decision to authorize the Project is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

2. The Reyes Peak Project was Not "Developed and Implemented Through a Collaborative Process that Includes Multiple Interested Persons Representing Diverse Interests and is Transparent and Nonexclusive."

Projects approved pursuant to the HFRA CEs must be "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(b)(1)(C), 6591d(b)(1)(C). The Forest Service failed to meet that directive in this case because multiple stakeholders, including Plaintiffs, were not

included in the development of the Reyes Peak Project, and the Forest Service failed to make any meaningful changes to the Project to address Plaintiffs' concerns.

The Forest Service's "Reyes Peak Forest Health and Fuels Reduction Project, Project Proposal" is dated May 8, 2020. 3-ER-370. The Project Proposal is a detailed plan prepared by the Forest Service that identifies the Project area; provides background information about the existing condition of the site; describes the Project goals, purpose, and need; sets forth the proposed action; and includes very specific design elements. 3-ER-370-396. This twenty-seven page Proposal was not made public until three weeks later, on May 27, 2020, when the Forest Service issued the Reyes Peak Project's scoping letter. 3-ER-368. This marked the first time that Plaintiffs became aware of the Project, and the Forest Service admits that prior to May 27, 2020, outreach for collaboration purposes was limited to fire personnel, federal agencies, and a few Native American Tribes. 2-ER-57 ("Community involvement with local and county fire personnel, including Ventura County Fire Department, U.S. Fish and Wildlife Service, and tribes preceded scoping."). None of Plaintiffs' organizations (some of whom have a long-established history of participating in the environmental review of projects in Los Padres National Forest), or the roughly seventy local and state stakeholder groups that signed and submitted scoping comments, were invited to collaborate prior to

May 27, 2020. 2-ER-224-225 (Forest Service memo showing that the only pre-scoping outreach was to Tribes and fire departments, and that "stakeholder outreach" did not commence until May 27, 2020). As a result, Plaintiffs were uninvolved in critical aspects of project development such as project location or project design elements (e.g., diameter limits, measures for protecting sensitive resources, etc.). In short, "multiple interested persons representing diverse interests" were left out of project development in violation of the HFRA CEs. 16 U.S.C. §§ 6591b(b)(1)(C), 6591d(b)(1)(C).

This Court's unpublished decision in *Greater Hells Canyon Council v. Stein*, is instructive and supports Plaintiffs here. 796 F. App'x 396 (9th Cir. 2020). In that case, this Court explained that the "Forest Service's own internal guidelines require it to identify and involve relevant stakeholders; design a strategy to conduct an open, inclusive, and transparent process; and plan for implementation and evaluation as part of the collaborative effort." *Id.* at 399. The Court determined that "[t]he record amply supports that [the Forest Service] did so in the Lostine Project." *Id.* at 399. The record for the Lostine Project divulges that the Forest Service engaged with the plaintiffs in that case, as well as a broad array of other interested stakeholders, during project development *prior* to the project proposal being issued publicly. *Greater Hells Canyon Council v. Stein*, No. 2:17-cv-00843-SU, 2018 WL 3966289, *13-14 (D. Or. June 11, 2018). Specifically, "the Forest

Service met with [plaintiffs and other stakeholders] to discuss possible projects in Wallowa County to address forest health issues, and agreed that highest priority location for action was the Lostine Corridor," and that meeting took place three months prior to the Lostine Project being proposed to the general public in a scoping letter. *Id*. at *13. In addition, a month prior to the Lostine Project scoping letter, the Forest Service "contacted plaintiff GHCC by phone . . . to discuss a possible project in the Lostine Corridor, including potential concerns the organization . . . may have and design considerations to address these concerns." *Id*. at *14. Only after that had all occurred did the Forest Service "publish[] public notice of the scoping period during which [the agency] would present the Project to the public, gather information, and identify issues from public input." *Id*.

In contrast, here, the Forest Service did not communicate at all with Plaintiffs to address project development prior to the Reyes Peak Project Proposal being publicly issued in the May 27, 2020, scoping letter. 2-ER-225. Consequently, unlike in *Greater Hells Canyon Council,* where the Forest Service not only obtained input, but also agreement, from the plaintiffs regarding the Lostine Project's location, here, Plaintiffs had no opportunity to provide input regarding where the project should occur, and very much *disagreed* with the Forest Service about the location. Likewise, Plaintiffs here received no opportunity to

express their concerns, or provide project design feedback, prior to development of the Project proposal or initiation of the public scoping period.

Furthermore, in *Greater Hells Canyon Council*, the Forest Service "altered Project design to address feedback," and the district court identified that as evidence of meaningful collaboration. 2018 WL 3966289, at *15. The alterations were substantial: "For instance, [the Forest Service] precluded mechanized equipment use in RCHAs associated with thinning and fuel treatments, and modified the removal of hazard trees in some RCHAs," the "[Lostine] Project was modified to avoid areas with heavy concentrations of moonworts, or due to the presence of goshawk or Cooper's hawk," and the "final Project provided for fewer temporary roads than an early version of the proposed action." *Id*.

Here, on the other hand, the Forest Service failed to meaningfully change the Project to incorporate input that was provided in Plaintiffs' or other scoping comment letters. For example, the Project design elements in the Decision Memo in Appendix A (2-ER-64-69) are nearly identical to those in the original Project Proposal (3-ER-389-393). The main improvements are that the Forest Service added some design elements to protect California condors, but that was done to incorporate specific recommendations from the U.S. Fish and Wildlife Service, not Plaintiffs or other public stakeholders. *See* 2-ER-98-100. No changes were made to better address dwarf mistletoe, to protect old-growth chaparral, to avoid the Sespe-

Frazier Inventoried Roadless Area (or at least reduce the diameter limit for logging there), or to avoid the proposed wilderness area. In short, unlike in *Greater Hells Canyon Council*, the final Decision here differed very little from the initial Project Proposal, thus evidencing a clear lack of actual collaboration. Because the evidence in the record does not support the Forest Service's determination that it engaged in a collaborative process, this Court should find that the Forest Service violated the collaboration mandate in the HFRA CEs. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

3. The Forest Service Failed to Establish that the Project's Location Complies with the Healthy Forests Restoration Act Categorical Exclusions.

To rely on the HFRA CEs, a project must be located "in the wildland-urban interface," or "Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the wildland-urban interface." 16 U.S.C. §§ 6591b(c)(2), 6591d(c)(2). Here, not only did the Forest Service admit that twelve percent of the Project area falls outside the HFRA location criteria (2-ER-37), the Forest Service also failed to demonstrate that the remaining eighty-eight percent of the Project area meets the location criteria. The Forest Service acknowledged that the Project "does not fall within the wildland-urban interface" (2-ER-71), but then, as discussed below, failed to provide information or evidence proving that the Project is located within Vegetation Condition Classes 2 or 3 in Fire Regime Groups I, II, or III.

Vegetation Condition Class refers to the "level to which current vegetation is different from the simulated historical vegetation reference conditions." 2-ER-37. "Vegetation Condition Class II represents moderate vegetation departure (34 to 66 percent), [and] Vegetation Condition Class III represents high vegetation departure (67 to 100 percent)." *Id*. Fire Regime Groups classify the "five natural (historical) fire regimes" and are "based on average number of years between fires (fire frequency) combined with the severity (amount of replacement) of the fire on the dominant over story vegetation." 2-ER-36-37.

The Project Decision Memo includes a map that identifies the location of the Vegetation Classes within the Project area. 2-ER-39. The map shows that eighty-eight (88) percent of the Project area falls within Vegetation Condition Classes 2 or 3, but the map provides no information regarding the overlap of those Vegetation Classes with respect to Fire Regime Groups I, II, or III. Instead, the only Fire Regime Group information provided is found in Table 5 of the Decision Memo. 2-ER-38. This Table 5, however, while it describes how many Project acres are within Fire Regime Groups I, II, or III, it does not describe *where* those acres are located. *Id*. Consequently, it is not possible to verify where Vegetation Condition Classes 2 and 3 actually overlap with Fire Regime Groups I, II, and III in the Project area. These areas of overlap are the only areas that qualify for the HFRA CEs, yet the Forest Service failed to validate the extent of overlap.

As discussed in *All. for the Wild Rockies v. Higgins*, "[i]t is not enough to simply declare that the Project is within [the proper location], 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." 535 F. Supp. 3d 957, 977 (D. Idaho 2021), vacated on other grounds, *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 489 (9th Cir. 2023). The Forest Service must be able to point to "something else that connects the dots and thereby would support [the agency's] position that the categorical exclusion under HRFA applies to the Project." *Id*.

Based on the information provided by the Forest Service in this case, it is simply impossible to verify that the eighty-eight percent of the Project area found in Vegetation Condition Classes 2 and 3 is also located in Fire Regime Groups I, II, or III. Accordingly, the Forest Service's conclusion that the Project complies with the HFRA CEs' location requirements is arbitrary and capricious. *See Native Ecosystems Council v. U. S. Forest Serv.,* 418 F.3d 953, 964 (9th Cir. 2005) (finding that Project violates the Forest Plan due to insufficient maps and the "opaque nature of the record on the factual basis for the Forest Service's analysis").

Finally, the Forest Service erred in concluding that the chaparral portion of the Project (272 acres) belongs in Fire Regime Group I. 2-ER-37. Instead, because

chaparral belongs in Fire Regime Group IV (*id.*), it is not eligible for inclusion in a HFRA CE project. 16 U.S.C. §§ 6591b(c)(2), 6591d(c)(2). Specifically, the Forest Service acknowledged that "Fire Regime Group I is defined as having a 0- to 35-year frequency with a low/mixed fire severity." 2-ER-37. The Forest Service then admitted that the "natural fire return interval for chaparral is 30 to 150 years," not 0-35 years. *Id*. Likewise, the Forest Service admitted that "chaparral has a high-intensity, crown fire regime," not a low/mixed fire severity regime. *Id*. As explicitly shown in Table 4 of the Decision Memo, chaparral's characteristics are associated with "Fire Regime Group IV" because they have a "Frequency/Severity" that is "35-200+ years, replacement severity," and a "Severity Description" that is "High-severity fires." *Id*.

Not only does the Forest Service's own Decision Memo plainly show the agency's error, the mistake was brought to the agency's attention by both Plaintiffs (2-ER-271-272) and Professor D'Antonio: "The fire regime categories/groups in the report are misused and some types are misclassified. For example, most chaparral is categorized as group 1 instead of group 4. Why?" 3-ER-347. Because the Forest Service's conclusion that chaparral belongs in Fire Regime Group I "runs counter to the evidence before the agency," it is therefore arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Had the Forest Service correctly identified chaparral as belonging to Fire Regime Group IV, the agency

would not be able to use the HFRA CEs in the chaparral portion of the Project, and this Court should therefore find that the Reyes Peak Project does not qualify for the HFRA CEs.

In conclusion, the Forest Service's reliance on CEs under NEPA and HFRA is arbitrary, capricious, an abuse of discretion, contrary to the evidence before the agency, and not in accordance with law.

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

Established in 2001 "to protect and conserve inventoried roadless areas on National Forest System lands," the Roadless Rule largely prohibits logging in inventoried roadless areas because it is one of the activities with 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*, 25 F.4th at 655. The Rule, however, also recognized that some areas in inventoried roadless areas "have become overgrown with smaller diameter trees," 66 Fed. Reg. at 3,257, and the Rule therefore contains a narrow exception allowing the "cutting, sale, or removal of generally small diameter timber." 36 C.F.R. § 294.13; 66 Fed. Reg. at 3,273.

Here, the Forest Service grossly abused the Rule's exception. The Reyes Peak Project authorizes the logging of trees as large as sixty-four inches in diameter in the Sespe-Frazier Inventoried Roadless Area. 2-ER-46. The Forest

Service's failure to cogently explain how the proposed logging within the Sespe-Frazier Inventoried Roadless Area is limited to "generally small diameter timber" renders its decision to authorize such logging arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made").

A. Trees Over Twenty-Four Inches in Diameter Cannot Be Logged Within the Sespe-Frazier Inventoried Roadless Area.

As discussed, the Reyes Peak Project contains exceptions allowing an unknown number of large trees to be logged. No rational reading of the Roadless Rule, however, endorses logging an unknown number of large trees, especially when, as here, those large trees can be the largest ones (i.e., sixty-four inches in diameter) in the Project area. While the Roadless Rule does not define the term "generally small diameter timber," the Rule is clear that its intent is to prohibit logging except for areas that are "overgrown with smaller diameter trees." 66 Fed. Reg. at 3,257.

Furthermore, the Forest Service itself understands that large trees should be left alone in the Sespe-Frazier Inventoried Roadless Area. Here, the Regional Forester explicitly chose to only authorize the logging of trees *under* twenty-four inches diameter within the Sespe-Frazier Inventoried Roadless Area. 2-ER-103. As explained in the record, "the Chief [of the Forest Service] requires two levels of

review for proposed projects in [inventoried roadless areas]." 3-ER-399. "Depending on circumstances, either the Chief or Regional Foresters must review planned projects involving . . . the cutting, removal or sale of timber in [inventoried roadless areas]." *Id*. Here, review by the Regional Forester was necessary (3-ER-400), and on March 25, 2021, the Regional Forester authorized the Reyes Peak Project's logging within the Sespe-Frazier Inventoried Roadless Area. 2-ER-103-104. Importantly, however, neither the briefing paper provided to the Regional Forester (2-ER-106-108), nor the document signed by the Regional Forester (2-ER-103-104), make any mention of logging trees over twenty-four 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." 2-ER-106; 2-ER-103 (authorizing cutting of "trees (<24 dbh) in the understory").

Despite the limitations imposed by the Regional Forester, the Reyes Peak Project Decision Memo allows logging of trees over twenty-four inches if the trees are "impacted by dwarf mistletoe" or if removal is deemed necessary for "overall forest health." 2-ER-44. These exceptions are extensive and yet are not identified or evaluated in the agency's approval. The Decision Memo is therefore arbitrary and capricious because it relies on, but then defies (by allowing trees over 24 inches to be cut in the Inventoried Roadless Area), the Regional Forester's

findings. Simply put, the Forest Service cannot point to an internal decision to support the Project, but then turn around and violate that same internal decision—such duplicity is quintessential irrational agency action. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

B. The Forest Service Has Failed to Justify the Logging of Trees Up to Twenty-Four Inches in Diameter Within the Sespe-Frazier Inventoried Roadless Area.

In *Los Padres ForestWatch v. U.S. Forest Serv.*, this Circuit addressed a similar project in Los Padres National Forest that approved logging of trees up to twenty-one inches diameter in the Antimony Inventoried Roadless Area. 25 F.4th 649. The Court 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 explained 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, the situation is even more egregious because for the Reyes Peak Project, the Forest Service asserts there is not even a three-inch difference between large and small trees, as the Forest Service argued for the Tecuya Project.

According to the agency, in the Sespe-Frazier Inventoried Roadless Area, a large tree is twenty-four inches and above, while a small tree is anything under twenty-four inches. 2-ER-45-46. It is not rational to discard an entire category of trees—here, medium-sized ones, especially when no reason at all is provided for doing so.

The reason the agency makes this absurd argument becomes clear when examining the Project tree data. The Project focuses its logging on trees that are twelve to twenty-four inches in diameter, cutting an average of 13.7 trees per acre in the twelve to twenty-four inch diameter range (2-ER-55, Table 7), while only cutting an average of 3.6 trees per acre in the zero to twelve inch range (*id.*).[10] By calling trees that are twelve to twenty-four inches in diameter "small," rather than "medium," the Forest Service can thereby pretend it is focusing on small diameter trees when in fact the agency is focusing on medium-sized trees, in violation of the Rule's intent that logging "activities are expected to be rare and to focus on small diameter trees." 66 Fed. Reg. at 3,257. Table 7 in the Decision Memo shows that

[10] On remand from the Ninth Circuit, the district court in *Los Padres ForestWatch v. U.S. Forest Serv.* found that trees up to twenty-one inches in 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 zero to two-inch diameter size class, and the Project focuses on trees in the twelve to twenty-four inch diameter range (2-ER-55, Table 7) rather than the zero to fourteen-inch class range. The district court decision in *Los Padres ForestWatch v. U.S. Forest Serv.* is also currently on appeal, but has not yet been heard by this Circuit.

79.2% of the logging will consist of trees twelve to twenty-four inches in diameter while only 20.8% will consist of trees zero to twelve inches in diameter. 2-ER-55. Moreover, these numbers do not take into account the unknown number of large trees that are authorized for logging under exceptions and which would even further demonstrate the Project's failure to focus on small trees.

For these reasons, this Court should find that the Forest Service's conclusions are contrary to the evidence in the record, and violate the plain language of the Roadless Rule.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Forest Service's authorization of the Reyes Peak Project be held to be arbitrary and unlawful, with the Project approval vacated and remanded to the agency with instructions to comply with NEPA, HFRA, and the Roadless Rule.

Respectfully submitted this 22nd day of December, 2023,

/s/ *Margaret Hall*

/s/ *Linda Krop*

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/s/ *Justin Augustine*

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