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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KARUK TRIBE; KLAMATH-SISKIYOU
WILDLANDS CENTER; ENVIRONMENTAL
PROTECTION INFORMATION CENTER; and COMPLAINT
KLAMATH FOREST ALLIANCE,

Plaintiffs,

v.

TYRONE KELLEY, in his capacity as Forest
Supervisor, Six Rivers National Forest; and
UNITED STATES FOREST SERVICE,

Defendants.

Declaratory and Injunctive Relief
(National Historic Preservation Act;
National Environmental Policy Act;
National Forest Management Act;
Healthy Forests Restoration Act; and
Administrative Procedures Act)

Administrative Procedures Act case

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief under the Administrative Procedures Act (APA), 5 U.S.C. 551-706. The claims arise from defendants' violations of the

National Historic Preservation Act (NHPA), 16 U.S.C. 470 et seq.; the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370(d), and its implementing regulations, 40 C.F.R. 1500-1508; and the Healthy Forests Restoration Act (HFRA), 16 U.S.C. 6512(b).

2. This action is brought pursuant to the right of review provision of the APA, 5 U.S.C. 702.

3. Plaintiffs allege that the defendants, Six Rivers Forest Supervisor Tyrone Kelley and the United States Forest Service ("Forest Service" or "Defendants"), violated federal law in their preparation, approval, and implementation of the Orleans Community Fuels Reduction and Forest Health Project (OCFR), proposed on the Orleans Ranger District on the Six Rivers National Forest, Pacific Southwest Region, U.S. Forest Service.

4. Plaintiffs challenge defendants' failure to comply with the NHPA, and to meet their procedural and substantive duties under by NEPA by failing to adequately perform environmental review procedures in its Final Environmental Impact Statement (FEIS) and associated Record of Decision (ROD) for the OCFR project as proposed and as implemented. Plaintiffs also challenge defendants' failure to comply with NEPA and the HFRA.

5. Plaintiffs participated in the review process of the OCFR project as part of a collaborative Partnership as required under the HFRA, placing confidence and trust that defendants would implement and provide collaborative monitoring of the OCFR project to ensure protection of the environment. However, as the Forest Service has implemented the OCFR project, it has allowed actions which were not considered or permitted within the scope of analysis and Record of Decision for the OCFR project. The Forest Service has also failed to comply with agreements reached with the collaborative Partnership prior to the issuance of the Record of Decision. These unpermitted actions, and the Forest Service's failure to uphold

agreements with the collaborative Partnership, have caused harms to environmental and cultural resources which were not analyzed and disclosed in the FEIS. Plaintiffs are reasonably concerned that these unpermitted actions may both increase the risk of wildfire to the community of Orleans and frustrate the community and collaborative's purpose of promoting the use of appropriate prescribed fire for cultural and ecological purposes.

6. Although defendants have admitted that the OCFR project as implemented is beyond the scope of analysis and approval, they have failed to stop the project and provide required review and consultation, and have stated their intent to proceed with project activities as early as May 1, 2010. Accordingly, plaintiffs seek an order declaring that the defendants have failed to comply with the NHPA, NEPA, and HFRA, and that each such violation constitutes a violation of the APA, entitling plaintiffs to injunctive relief and an award of attorneys' fees and costs associated with this litigation. The requested relief is necessary to preserve the *status quo*, to prevent illegal agency action, and to forestall irreparable injury to the environment.

JURISDICTION, VENUE, AND BASIS FOR RELIEF

7. This Court properly has jurisdiction over this action under 28 U.S.C. 1331 (federal question), 28 U.S.C. 1346 (United States as defendant), 28 U.S.C. 1361 (action to compel an officer of the United States to perform her duty), and 28 U.S.C. 1362 (actions by Indian tribes to enforce federal law). Judicial review is authorized by 5 U.S.C. 706 because plaintiffs are adversely affected within the meaning of relevant statutes.

8. The decision giving rise to this complaint was made in Eureka, California, by the Six Rivers Forest Supervisor. Venue is properly vested in this Court by 28 U.S.C. 1391(e).

9. Declaratory relief is appropriate under 5 U.S.C. 703 and 28 U.S.C. 2201. Injunctive relief is appropriate under 5 U.S.C. 703 and 28 U.S.C. 2202.

PARTIES

10. Plaintiff Karuk Tribe is a federally recognized Indian tribe. The governing body of the Tribe is the Karuk Tribal Council. The Tribe is suing in its own capacity and as *parens patriae* on behalf of its members. The OCFR project is located in the Karuk Tribe's Panamniik World Renewal Ceremonial District (Ceremonial District) near Orleans, California. The Ceremonial District has immense cultural and historical significance to the Tribe and its members. The Tribal Council's mission is to promote the general welfare of all Karuk people, to establish equality and justice for the Tribe, to restore and preserve Tribal traditions, customs, language and ancestral rights, and to secure to the Tribe and its descendants the power to exercise the inherent rights of self governance. The Tribe's members live near, use, enjoy, and recreate on public lands, including the Six Rivers National Forest. Members of the Tribe visit and enjoy the OCFR project area for spiritual, religious, cultural, historical, educational, recreational, subsistence, and scientific activities. Implementation of the OCFR project without full compliance with the NHPA, NEPA, and the HFRA has affected, is affecting, and will adversely affect the Tribe's interest in preserving its cultural heritage and in protecting sites of historical, cultural and religious significance to the Tribe and its members. The Karuk Tribe would sustain injury to its interests and those of its members if the OCFR project is undertaken in the absence of a legally and scientifically sufficient analysis of the project's environmental impacts and compliance with the National Historic Preservation Act. The Karuk Tribe's interests and those of its members would sustain further injury because the project will diminish spiritual, religious, cultural, historic, subsistence, aesthetic, and recreational value, and harm forest health in and around the project area. These injuries are likely to be redressed if the Court enjoins further work on the OCFR project until defendants fully comply with these requirements of

federal law. The Karuk Tribe commented on and administratively objected to the OCFR project.

11. Plaintiff Klamath-Siskiyou Wildlands Center (KS Wild) is a non-profit corporation organized under the laws of Oregon. KS Wild is a 501(c)(3) tax exempt, public interest conservation organization based in Williams, Oregon, and Ashland, Oregon. KS Wild's organizational mission is to conserve the globally outstanding biological diversity of the Klamath-Siskiyou region in Southern Oregon and Northern California. KS Wild seeks to protect the ecological resources of the region by protecting and preserving the little remaining mature and old growth forests and associated species in the Klamath-Siskiyou ecoregion. KS Wild's members use, enjoy, and recreate on public lands, including the Six Rivers National Forest. Members of KS Wild visit and enjoy the OCFR project area for educational, recreational, and scientific activities, including hiking, rafting, camping, photography, and observing wildlife. KS Wild would sustain injury to its interests if the OCFR project is undertaken in the absence of a legally and scientifically sufficient analysis of the project's environmental impacts and compliance with the National Historic Preservation Act. KS Wild's interests and those of its members would sustain further injury because the project will degrade water quality, diminish aesthetic and recreational value, and harm forest health in and around the project area. KS Wild commented on and administratively objected to the OCFR project.

12. Plaintiff Environmental Protection Information Center (EPIC) is a non-profit corporation organized under the laws of California. EPIC is a grassroots organization dedicated to the protection and restoration of forests, watersheds, and biodiversity in northern California. EPIC maintains its offices in Humboldt County, California. Most of EPIC's approximately 3,000 members live in northern California. EPIC's members use, enjoy, and recreate on public lands, including the Six Rivers National Forest. Members of EPIC visit and enjoy the OCFR

project area for educational, recreational, and scientific activities, including hiking, rafting, camping, photography, and observing wildlife. EPIC would sustain injury to its interests if the OCFR project is undertaken in the absence of a legally and scientifically sufficient analysis of the project's environmental impacts and compliance with the National Historic Preservation Act. EPIC's interests and those of its members would sustain further injury because the project will degrade water quality, diminish aesthetic and recreational value, and harm forest health in and around the project area. EPIC commented on and administratively objected to the OCFR project.

13. The Klamath Forest Alliance (KFA) is a non-profit grass roots environmental organization which was founded in 1989 and has members in Humboldt, Shasta, Trinity, Siskiyou, Modoc and Klamath Counties in California. Its primary mission is to promote sustainable forest ecosystems and sustainable communities. KFA has provided comments, guidance and assistance to both the Forest Service and Bureau of Land Management for twenty years. KFA staff and members live near and recreate in the OCFR project area, and are concerned about the quality of habitat for wildlife species, and the impacts, which could result from implementing the proposed actions. KFA maintains a main office and library in Orleans, California. KFA would sustain injury to its interests if the OCFR project is undertaken in the absence of a legally and scientifically sufficient analysis of the project's environmental impacts and surveys for management indicator species, sensitive species and compliance with the National Historic Preservation Act. The interests of KFA and its members would sustain further injury because the project will diminish aesthetic and recreational value, and harm wildlife and their habitat in and around the project area.

14. Defendant Tyrone Kelley is sued in his official capacity as the Forest Supervisor

for the Six Rivers National Forest, and took and/or authorized the actions alleged herein.

15. Defendant U.S. Forest Service is a federal agency within the U.S. Department of Agriculture. Defendant Forest Service is, by law, responsible for the management policies and actions undertaken with respect to the public lands. By statutory authority, and the agency's own regulations, defendant is also responsible for implementing the NHPA, NEPA, HFRA, and other land management laws and regulations pertaining to actions and decisions on lands administered by defendants. The Forest Service has an obligation to consult and coordinate with the Karuk Tribe and other governmental units when making findings and determinations under Section 106 of the NHPA regarding the effects of Forest Service-approved projects on cultural resources. The Forest Service also has a fiduciary duty under the federal trust responsibility to consult and coordinate with the Tribe and protect the Tribe's properties, including traditional cultural properties, when approving and assessing the effects of projects.

FACTUAL AND PROCEDURAL BACKGROUND

The Review and Approval of the OCFR Project

16. The Orleans Ranger District of the Six Rivers National Forest Service proposed elements of what became the OCFR project in January 2006, in what was then titled the Sunset West project. By October 2006 the name was changed to Orleans Community Fuels Reduction Project. In scoping notices issued in February 2007 and again in October 2007, the project was again renamed, now as Orleans Community Fuels Reduction and Forest Health (OCFR) project. The Forest Service announced that OCFR was to cover 2698 acres, with planned activities to occur over the course of several years.

17. The Forest Service also announced that OCFR would be prepared under the provisions of the Healthy Forest Restoration Act (HFRA), 16 U.S.C. 6512(b). Consistent with

the Congressional purpose of the HFRA "to reduce wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative process of planning, prioritizing, and implementing hazardous fuel reduction projects," [HFRA 2(1)], section 104(f) of the HFRA requires the Forest Service to propose projects through a collaborative planning process with the interested public. 16 U.S.C. 6514(f).

18. The OCFR project and its proposed activities span the Panamniik World Renewal Ceremonial District (Ceremonial District) and also span the Amaikiarram Cultural Area and are adjacent to the Katimiin Cultural Management area (Cultural Areas), as well as numerous Tribal Trust properties. These areas are sacred and of important cultural significance to the Karuk Tribe.

19. The Ceremonial District is an integral part of the social fabric that links the indigenous people of the Klamath River into a cohesive social system, which is still intact today. The families of the Panamniik, as well as numerous other tribal members and even members of other neighboring tribal groups, continue to utilize the cultural and natural resources throughout the OCFR project area. There are many undisclosed sacred sites, gathering sites, gathering areas, hunting areas and fishing spots as well as prehistoric, historic and contemporary use areas throughout the landscape. Tribal people in the area continue to practice a close relationship with the land and value many resources there as sacred. The landscape of natural and cultural resources (natively viewed as one, without distinction) has continued to be occupied and traditionally used.

20. One of the more dynamic ways in which the Karuk have influenced and managed the landscape within the OCFR project area was through the use of fire. Spiritual fires are currently conducted throughout the Ceremonial District on an annual basis. There are many tan

oak stands throughout the project in conditions appropriate for cultural burning under tribal prescriptions for this particular species. More than one Medicine Man Trail in the OCFR project area has already been impacted by project implementation.

21. The Ceremonial District, which includes spiritual resources and uses, was nominated for listing on the National Register of Historic Places in 1978. The district has been determined to be eligible for listing on the Register. Under Section 106 of the NHPA, 16 U.S.C. 470(f), a federal agency having jurisdiction over a proposed "Federal or federally assisted undertaking" must, "prior to the approval of the expenditure of any Federal funds on the undertaking, . . . take into account the effect of the undertaking on any district, site, building structure or object that is included in *or eligible* for inclusion in the National Register." (emphasis added). See also 36 C.F.R. 800.1, 800.16(l).

22. The project area encompasses 2698 acres surrounding the town of Orleans. The forest stands surrounding the rural Klamath River town of Orleans are ecologically rich in wildlife, including Northern spotted owl, bald eagle, eagles and osprey and diverse and endemic plant species, such as the Orleans iris. The multiple steep and rugged watersheds all flow into the Klamath River, which once harbored some of the most productive salmon runs on the Pacific Coast. Much of the area has been heavily affected by the combination of past logging practices and fire suppression, which has removed many of the large, fire-resistant trees from the landscape, while allowing dense stands of fire-prone young conifers to become established. However there are still stands of old growth remaining, and dominant, centuries-old trees are scattered throughout the landscape.

23. From initial project scoping, the Forest Service pursued meetings with the plaintiffs and others in the project area (Collaborative Partnership, or Partnership), in an effort to

develop a collaborative action alternative. Over the course of more than two years, the Partnership met with the Forest Service a number of times to discuss and outline various issues, including the scope of the project, concerns which needed to be resolved, protection of environmental and cultural resources, and project implementation to include, among other things, collaborative monitoring with Partnership participation.

24. As part of the Partnership, plaintiffs provided continuous input into the OCFR project planning process, , through comments, meetings and fieldwork, in an effort to meaningfully participate in the stewardship of these public lands.

25. According to the Forest Service, the alternative developed in the Final Environmental Impact Statement (FEIS) and approved in the Record of Decision (ROD) is the product of this collaborative Partnership process.

26. On March 19, 2008, the Forest Service issued a Draft Environmental Impact Statement (DEIS) for the OCFR project, commencing a 60-day period for review and public comment.

27. The DEIS states (on pages 2-4) that the purpose of the OCFR project was to: (1) reduce hazardous fuel conditions on forest lands surrounding the community of Orleans; (2) enhance cultural values associated with the Panamniik World Renewal Ceremonial District through improved forest health and a reduction of fuels; (3) reduce stand densities; (4) promote the development and maintenance of diverse stand structures and species composition; (5) restore fire-adapted ecosystem functions, such that when fire returns to the ecosystem, impacts are minimized; and (6) maintain and restore the species, structure and function of riparian reserves.

28. The collaborative partnership agreed with that statement of the project's purpose

and need.

29. However, the project as proposed in the DEIS was consistent neither with that stated Purpose and Need nor with the consensus position of the collaborative partnership. While the collaborative group had agreed on and repeatedly emphasized the need to prioritize treatment of small diameter fuels near human dwellings and key access routes, both to reduce fire risks to the community of Orleans and its environs and to promote greater resilience in forest stands, the DEIS proposed a large commercial logging project including substantial logging of large, fire-resistant trees and areas remote from the human community.

30. Members of the collaborative informed the Forest Service on numerous occasions that they did not support such logging in the context of the OCFR project, noting concerns that it could increase the risk to the community of dangerous fires in the project area, would risk harm to important cultural and environmental resources, and would not be consistent with the best available science concerning fire risk reduction.

31. Plaintiffs and others provided timely comments, concerns, and information to the Forest Service, objecting to the characterization of the proposed action alternative, noting its inconsistency with the outcomes of the three-year Partnership process, identifying environmental and cultural issues which should have been addressed, and requesting additional environmental review. However, just as the Forest Service refused repeatedly to negotiate the boundaries and extent of the proposed project with the collaborative group, the agency insisted the project contain a significant amount of commercial logging despite the contradiction between that goal and the fire risk reduction and forest health purposes presented for the project. It has never been clear whether the Forest Service sought to include substantial logging for commercial purposes in the OCFR project to satisfy the demands of the local timber industry and their political

supporters, or to meet internal quotas, or for both reasons.

32. On or about June 13, 2008 the Forest Service issued the Final Environmental Impact Statement (FEIS) for the OCFR project.

33. The FEIS purported to remedy all issues raised in public comment, and proposed an action alternative that would treat approximately 2698 acres of forest lands by thinning and/or pruning, hand piling and burning, jackpot burning, yarding tops, and/or understory burning to increase wildfire suppression effectiveness in and around the community of Orleans.

34. The proposed alternative retained the commercial logging components proposed in the DEIS, including substantial logging of large, fire-resistant trees and remote stands that were not a priority for community risk reduction.

35. On or about July 14, 2008, the plaintiff members of the Partnership, as well as the Mid-Klamath Watershed Council and the Orleans/Somes Bar Fire Safe Council, filed with the Forest Service an "Objection" to the OCFR Project FEIS, as provided under the HFRA.

36. That Objection detailed issues concerning (1) retention of tree canopy, particularly necessary for protected wildlife species listed or proposed for listing under the Federal Endangered Species Act, such as the Northern spotted owl, bald eagle, and Pacific fisher; (2) removal of large diameter trees as inconsistent with the project purpose; (3) the roles and responsibilities of the parties to the collaborative Partnership; (4) the need for project effectiveness and validation monitoring; and (5) the significant impacts of the project on the Ceremonial District.

37. On or about August 5, 2008, the Partnership participated with the Forest Service in a field trip and Objection Resolution Meeting.

38. On August 11, 2008, the plaintiffs and Partnership reached a Resolution

Agreement in which the Forest Service agreed to: (1) drop late-successional unit 146; (2) seek additional hardwood release treatment opportunities with the Partnership's consent; (3) grant the Partnership access to project files, budgets, GIS information and maps; (4) explore options for a future stewardship plan; (5) discuss opportunities for stewardship implementation; (6) allow the Partnership to provide input on project treatment sequence; (7) notify and meet with the Partnership to discuss environmental concerns during implementation; (8) address any environmental concerns about cultural issues during implementation with the Karuk Tribe on a government-to-government basis; (9) notify the Partnership of any survey results for wildlife; and (10) establish a collaborative multi-party monitoring plan.

39. On August 15, 2008, Six Rivers National Forest Supervisor Tyrone Kelley signed a Record of Decision (ROD) to implement Alternative 2 of the OCFR project "as modified during the resolution process" under the HFRA, authorizing implementation of the proposed action as described in the FEIS, and eliminating commercial harvest in unit 146.

40. The proposed action would yield about seven million board feet of timber volume, and the entire treatment area would be underburned with the exception of Unit 230.

41. Throughout the review and approval process, rather than consulting according to the requirements of Section 106 of the NHPA, defendants have relied solely on the 2001 document titled "First Amended Regional Programmatic Agreement" (PA) which was entered into by the Pacific Southwest Region of the Forest Service; the California State Historic Preservation Officer; and the Advisory Council on Historic Preservation, "Regarding the Process for Compliance with Section 106 of the National Historic Preservation Act for Undertakings on the National Forests of the Pacific Southwest Region." The PA failed to cover the extent of potential impacts from the OCFR project or the project as implemented.

42. Although the PA in some circumstances allows the Forest Service to avoid site-specific NHPA consultation, it only covers archaeological resources, and does not cover spiritual or cultural resources and uses such as those encompassed by the Ceremonial District.

43. For the resources it does cover, the PA contains specific "Standard Resource Protection Measures," which must be met when the Forest Service is aware a project may impact sites known to be eligible under the NHPA.

44. The defendants did not comply with the Standard Resource Protection Measures for known sites.

45. Plaintiffs relied on the collaborative Partnership process with the Forest Service, on the agency's statements in the FEIS, Resolution of Objections, and the ROD, and their hope and assumption that the law would be followed and the OCFR project implemented as approved and agreed to through the Resolution of Objection process.

The Project Implementation Is Outside the Scope of Analysis and Record of Decision

46. The project implemented by the Forest Service is not within the scope of the OCFR project that was reviewed in the FEIS, the subject of the Objection and Resolution of Objection agreed to by the plaintiffs, or the OCFR project approved by the ROD.

47. Commercial logging under the OCFR project began in late 2009 and is expected to continue over the course of 2010. According to the DEIS, fuels treatments could continue for as long as ten years.

48. Project implementation activities are not within the scope of analysis and approval articulated in the FEIS and ROD in several respects, including but not limited to: expanding the size of corridors up to six times larger than identified in the FEIS; cutting healthy hardwoods and other trees in these oversized corridors and elsewhere; using heavy equipment in

hand units such as in equipment exclusion buffer zones; using heavy equipment in and around the Spiritual Trail, leaving large material on the ground which contributes to surface fuel density; and removing hardwoods to increase ladder fuel continuity and density over time.

49. Defendants agreed through the Objection Resolution process that plaintiffs would be provided an opportunity for substantive review of the OCFR contract prior to it being offered.

50. Defendants refused repeatedly even to provide a copy of the contract until operations were well underway.

51. The OCFR contract as let is not consistent with the project record, including the FEIS, ROD, and objection resolution.

52. Defendants also agreed to map the trees over 24 inches in diameter (dbh) in the skyline cable yarding corridors, landings and skid roads and to submit this map to the collaborative partnership for review, but have not done so.

53. The project as implemented has caused impacts to and within the Ceremonial District and Cultural Areas, including impacts which were not properly analyzed, disclosed and mitigated in the OCFR FEIS, and which are outside the scope of analysis and decision for the OCFR project.

54. Defendants failed to initiate NHPA consultation regarding these impacts.

55. The Forest Service disregarded concerns raised by the Karuk Ceremonial Leader and tribal representatives on numerous occasions during project implementation regarding the ongoing damage to the Ceremonial District.

56. Tribal requests to move log decks impacting a ceremonial trail were ignored.

57. Concerns about the inappropriate use of heavy equipment on a ceremonial trail and damage to trees adjoining the trail were rejected by the Forest Service timber sale

administrator.

58. The OCFR project designates many treatment areas as hand units -- areas where fuels reduction thinning work is to be conducted without the use of heavy equipment.

59. Among other reasons, hand units are designated in OCFR to act as buffers to protect features associated with the Ceremonial District.

60. In the course of project implementation, the Forest Service allowed heavy equipment to be operated in hand units, and allowed such equipment to directly and indirectly impact a Spiritual Trail used by the Karuk Medicine Man during Panamniik World Renewal ceremonies within the Ceremonial District.

61. The project as implemented has cut, and the Forest Service has stated that it plans to continue to cut, guy-line trees along the Medicine Trail in the hand unit, directly impacting the Tribe's spiritual and cultural use of the Trail.

62. Contrary to both the specific provisions and the stated purpose and need of the OCFR project, heavy equipment was parked directly on the Medicine Trail.

63. Heavy equipment was used to create log decks of hardwood trees generated in the course of logging and yarding activities directly along the Spiritual Trail.

64. The impacts of these actions have not been evaluated under NEPA, as they were not analyzed in the FEIS nor disclosed in the ROD.

65. These impacts have also not been the subject of NHPA consultation with the Tribe, State Historic Preservation Officer (SHPO), or Advisory Committee on Historic Preservation (ACHP).

66. Operating heavy equipment in hand units along the Spiritual Trail required prior SHPO concurrence, which did not occur.

67. These changes also required SHPO consultation, because some of the trees in the area are specifically associated with the District's eligibility determination.

68. In addition, the project as implemented adversely impacts the visual quality needs of spiritual users within the overall setting of the Ceremonial District.

69. As implemented, the project fails to meet its own stated requirements for the amount and type of hardwood trees to be retained and the amount of unutilizable material to be removed in treatment areas.

70. These requirements were included in the project because removing, for example, too many mature hardwoods or leaving too much unutilizable material can severely affect forest health, fire resilience, and community fire protection, could frustrate the project objective of allowing appropriate cultural burning and is contrary to the project's purpose(s) of enhancing cultural values, promoting the development and maintenance of diverse stand structures and species composition and restoring fire adapted ecosystem functions.

71. The OCFR project provides that hand units in sensitive areas would be treated by tribal crews with a Karuk Priest present to avoid and minimize potential impacts.

72. As implemented, activities within hand units in sensitive areas were contracted to out-of-area crews and slash piles were placed on sensitive sites.

73. Such impacts to sensitive sites within an OCFR unit were not discussed in the project NEPA analysis.

74. Certain trees within designated hand units, including both hardwoods and conifers, were to have been protected under the terms of the OCFR project due to their association with the NHPA eligibility determination for the Cultural District.

75. Defendants allowed some of these trees to be felled and others to be scarred.

76. Defendants failed to consult with the SHPO as to these impacts.
77. There was no archaeologist on site during project implementation.
78. The FEIS promised that an archaeologist would be on site during project implementation to ensure (1) cultural sites and buffer zones would be flagged and avoided; (2) flags would be removed in a timely manner to reduce unwanted attention to cultural sites; and (3) potential impacts to previously unidentified cultural sites would be minimized.

79. As implemented, the OCFR project is not within the scope of the stated purpose and need for the project. Activities that have occurred during project implementation which are not consistent with managing forest stands to reduce fuels accumulations and improve forest health around the community of Orleans, while enhancing cultural values associated with the Ceremonial District and Cultural Areas include, but are not limited to the following:

- a. The skyline corridors in the project as implemented are approximately 20 to 40 feet wide, far in excess of the OCFR project as evaluated and approved, and double to quadruple the ten-foot width limit identified in the FEIS.
- b. The clearings which have been and will be created for the yarder in the project as implemented are larger than were evaluated and approved for the OCFR project; landings were analyzed to be 0.25-0.5 acres in size for skyline and ground based activities.
- c. Many large trees have been logged in these expanded corridors and yarding areas, compromising the objectives of the OCFR project to protect overstory trees from wildfire, protect hardwoods and wildlife habitat, and create fire-resilient stands.
- d. The cutting of so many large trees in the project as implemented fails to maximize retention of large trees as required by the HFRA. This is contrary to

the OCFR project as approved because this issue was central to the substantive agreement reached between the parties to resolve plaintiffs' formal objection to the project. The FEIS claims that "the project would NOT remove known or potential nest tree sites (pre-dominants), snags or reduce vegetative screening of [eagle] nest site within the primary distance zone of the Wakaar [bald eagle] territory," and claims as well that "[n]o pre-dominant tree would be removed," but such trees have been removed.

- e. The 60% canopy closure requirement in Units 1 and 2 of the OCFR project has been violated through project implementation, and actual canopy closure is much lower. Such excessive reductions in canopy cover may seriously detract from the fuels reduction and forest health purposes of the OCFR project, as well as causing impacts to wildlife habitat not adequately addressed in the FEIS.
- f. Despite requirements in the OCFR project that hardwoods be retained and protected, in part by directional felling of conifers, the Forest Service has allowed many mature hardwood trees to be removed where directional felling should have avoided those losses. The Forest Service has allowed the contractor selected for the project to sell hardwoods as firewood on past local sales, creating an economic incentive for the contractor to not retain hardwoods.
- g. Contrary to the approved OCFR project, the road has been used for logging activity in wet weather conditions, causing impacts which were not within the scope of analysis of the FEIS and the ROD.
- h. The Limited Operating Period (LOP) for Black Stain Root Rot, which allow thinning operations to occur only between July 1 and August 31, was violated

with the logging of Unit 51.

Defendants Have Refused to Stop Project Implementation Activities Which Are Not Within the Scope of the OCFR Project

80. Pursuant to Resolution 3.G, in December 2009, plaintiffs notified the Forest Service of the project implementation problems and impacts as detailed above, and requested that the Forest Service take action to halt mechanical implementation and resolve the concerns.

81. The Forest Service agreed in December 2009 to suspend the contract until it could work with the Tribe and collaborative Partnership to resolve the issues, and finalize a multi-party implementation and effectiveness monitoring plan.

82. The Forest Service held meetings with the Karuk as a government to government consultation on the Tribe's environmental concerns, and advised the Tribe in early February 2010 that pre-work on-the-ground reviews with Tribal representatives, a collaborative monitor, and defendants would be key to ensure that implementation of logging plans was consistent with project objectives.

83. The Partnership reiterated its concerns to the Forest Service in February 2010, listing 13 issues that remain outstanding as not consistent with the OCFR project and its purpose and need. A true and correct copy of this letter is attached as Exhibit A.

84. On March 25, 2010, the plaintiffs with the Partnership met informally with the Forest Service to try and resolve these concerns.

85. At the March 25 meeting, defendants acknowledged that portions of the project implementation have caused impacts that were not disclosed or analyzed in the OCFR project FEIS or ROD, including but not limited to, log piling and operation of heavy equipment in hand units and the impacts of guy tree designation in hand units.

86. Defendants also acknowledged that required unit archaeological surveys have not been completed, and that while impacts to a Spiritual Trail, the Ceremonial District and Cultural Areas have occurred as a result of project implementation, no formal analysis has been completed.

87. Defendants also advised that, regardless of these impacts, project implementation would proceed as of May 1, 2010.

88. Faced with the potential for project implementation to commence as early as May 1, 2010, and relying on the agreements reached through the HFRA objection process, on April 3, 2010, plaintiffs sent a letter to the Defendants, requesting rescission of the August 15, 2008 Record of Decision for the OCFR project, or in the alternative to suspend the project activities in order for the Partnership to pursue resolution of the concerns through the collaborative process. A true and correct copy of this letter is attached as Exhibit B.

89. The Forest Service has not responded to plaintiffs' April 3, 2010, letter.

90. The Forest Service has violated NEPA by implementing a project which is not within the scope of analysis and approval of the OCFR project and lacks valid NEPA documentation, and has abrogated the result of the collaborative effort by failing to implement agreements reached during the HFRA objection process and through lack of adherence to the project's stated purpose and need.

91. This action is filed due to the Forest Service's failure to comply with and follow the scope of analysis and approval of the OCFR project as detailed in the FEIS, ROD, and Resolution Agreement.

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COUNT I

Violation of the National Historic Preservation Act

Failure to Consult

92. Plaintiffs hereby reallege and incorporate the preceding paragraphs.

93. The purpose of the NHPA, enacted in 1966, is to preserve the history and prehistory of this country and protect for future generations the historical and cultural resources that are part of the nation's heritage.

94. Under Section 106 of the NHPA, 16 U.S.C. 470f, a federal agency having jurisdiction over a proposed "Federal or federally assisted undertaking" must, "prior to the approval of the expenditure of any Federal funds on the undertaking, . . . take into account the effect of the undertaking on any district, site, building structure or object that is included in or eligible for inclusion in the National Register." See also 36 C.F.R. 800.1, 800.16(l).

95. The NHPA requires the agency to make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. 60.4; assess the effects of the undertaking on any eligible historic properties found; determine whether the effect will be adverse; and avoid or mitigate any adverse effects. 16 U.S.C. 470 *et seq.*; 36 C.F.R. 800.4, 800.5, 800.8(c)(4).

96. The NHPA specifies that "[p]roperties of traditional religious and cultural importance to an Indian tribe . . . may be determined to be eligible for inclusion on the National Register" and are therefore subject to the procedural safeguards of Section 106 of the NHPA. 16 U.S.C. 470a(d)(6)(A); see also 36 C.F.R. 800.16(l)(1).

97. An agency's consideration of the effects of its "undertakings" on historic properties must take place "prior to the approval of the expenditure of any Federal funds on the

undertaking or . . . the issuance of any license." 16 U.S.C. 470f.

98. Project planning activities conducted before completing compliance with section 106 cannot restrict the subsequent consideration of alternatives to avoid, minimize, or mitigate the undertaking's adverse effects on historic properties. 36 C.F.R. 800.1.

99. Once Section 106 is triggered, the federal agency undertaking the proposed project must identify the area of potential effects, locate all historic properties in that area, and assess the actual effect of the project upon those specific properties. 36 C.F.R. 800.4, 800.5.

100. Federal agencies must "make a reasonable and good faith effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties." 36 C.F.R. 800.3(f)(2).

101. The agency official must involve all of the "consulting parties" in "all findings and determinations made during the Section 106 process." 36 C.F.R. 800.2(a)(4).

102. The "consulting parties" for off-Reservation projects must include the State Historic Preservation Officer (SHPO) and "any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking." 36 C.F.R. 800.2(c)(1), 800.2(c)(2)(ii).

103. The NHPA requires that in carrying out their responsibilities under Section 106, federal agencies "shall consult with any Indian tribe . . . that attaches religious and cultural significance to [historic] properties." 16 U.S.C. 470a(d)(6)(B) (emph. added); see also 36 C.F.R. 800.2(c)(2)(ii).

104. Consultation must provide an Indian tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on

the undertaking's effects on such properties, and participate in the resolution of adverse effects."
36 C.F.R. 800.2(c)(2)(ii).

105. In the initial stage of the consultation, agencies must gather information from any Indian tribe to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register.
36 C.F.R. 800.4(a)(3).

106. The federal agency must continue to consult the Tribe(s) at each stage of the Section 106 process:

The agency official shall ensure that consultation in the section 106 process provides the Indian tribe . . . a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.

36 C.F.R. 800.2(c)(2)(ii)(A).

107. If an adverse effect is found, the agency must document it and must consult further to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties. 36 C.F.R. 800.5, 800.6, 800.11.

108. Agency officials are to reevaluate historic properties if a prior evaluation is incomplete. 36 C.F.R. 800.4(c)(1).

109. A determination or finding required by the NHPA regulations must be "supported by sufficient documentation to enable any reviewing parties to understand its basis." 36 C.F.R. 800.11(a).

110. Where a Memorandum of Agreement is in place under the NHPA, 36 C.F.R. 800.6(c) requires federal agencies to "ensure that the undertaking is carried out in accordance

with the memorandum of agreement."

111. Defendants' approval of the OCFR project is a federal "undertaking" subject to Section 106 of the NHPA.

112. The Ceremonial District is "eligible" under the NHPA.

113. The OCFR project has already affected and may continue to affect the Ceremonial District, Cultural Areas and the Karuk Tribe's spiritual, religious, cultural, and historical uses of the District, in the absence of consultation.

114. Instead of initiating consultation with the SHPO under NHPA section 106 (per 36 C.F.R. Part 800) for the review of the OCFR project as project and as implemented, the Forest Service relied solely on the Programmatic Agreement (PA) for the Six Rivers National Forest.

115. The PA covers only archeological resources, but the Ceremonial District includes spiritual resources and other uses not covered by this Programmatic Agreement, and therefore the PA is inadequate to cover the extent of potential impacts from the project.

116. Defendants have effectively foreclosed the Advisory Council's (ACHP's) ability to comment on the project pursuant to 36 C.F.R. 800.9(b), and violated the principles of Executive Order 13007 (regarding Indian Sacred Sites), by adversely affecting the physical integrity of the Spiritual Trail and setting associated with the Ceremonial District.

117. In addition, Defendants did not initiate consultation with the California State Historic Preservation Office (SHPO) during project review, approval or implementation. Defendants are aware of known impacts to the Ceremonial District, Cultural Areas and other Tribal resources from the OCFR project, but have not initiated consultation with the SHPO or ACHP.

118. Defendants also failed to update the record relating to the eligibility of the

Ceremonial District, despite the fact there have been many new sites, uses, information, and/or impacts identified within and adjacent to the Area of Potential Effects for the OCFR project since the original determination of eligibility in 1978.

119. Defendants' failure to engage in any form of consultation with the Tribe or SHPO or ACHP when making its findings and determinations violated the NHPA.

120. The PA contains "Standard Resource Protection Measures" which must be followed for known eligible sites.

121. Defendants did not follow the Standard Resource Protection Measures with regards to the Cultural District.

122. Plaintiffs have suffered legal wrongs because of the Defendants' actions and omissions as set forth herein and are adversely affected and aggrieved by this agency action within the meaning of the APA, 5 U.S.C. 702.

123. Defendants actions and omissions set forth herein are arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedures required by law within the meaning of the APA, 5 U.S.C. 706(1) & (2)(A), and should therefore be declared unlawful and set aside by this Court.

124. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412.

COUNT II

Violation of NEPA

Failure to Adequately Disclose and Analyze Environmental Impacts

125. Plaintiffs hereby reallege and incorporate the preceding paragraphs.

126. The National Environmental Policy Act (NEPA) requires federal agencies to

analyze the foreseeable environmental impacts, including direct, indirect, and cumulative impacts, of "major federal actions." 42 U.S.C. 4332(2)(c); 40 C.F.R. 1508.7, 1508.25(a)(2).

127. NEPA requires that the environmental consequences of a project be completely discussed in the Environmental Impact Statement, to include among other things, a discussion of direct and indirect effects and their significance, any conflicts between other federal, regional, state, local or Indian Tribal plans, policies, and controls for the areas of concern. 40 C.F.R. 1502.16.

128. NEPA requires an EIS to present the full scope of a project, to include all actions and connected actions which may proceed under the project. 40 C.F.R. 1508.25(a).

129. The OCFR project is a major federal action as defined by NEPA.

130. The OCFR project FEIS fails to adequately analyze and disclose direct, indirect, and cumulative effects of the project, including but not limited to: impacts (1) to the Ceremonial District, Cultural Areas, and the spiritual, cultural, and historical values they embody; (2) to the NSO (Northern spotted owl); (3) to the bald eagle; (4) to the Pacific fisher; (5) to fungi; (6) to other wildlife; and (7) from increased fire danger.

131. The Forest Service has also violated NEPA by implementing a project which is not within the scope of analysis and approval of the OCFR project and lacks valid NEPA documentation, and has abrogated the result of the collaborative effort by failing to implement agreements reached during the HFRA objection process and through lack of adherence to the project's stated purpose and need.

132. Plaintiffs have suffered legal wrongs because of the Defendants' actions and omissions as set forth herein and are adversely affected and aggrieved by this agency action within the meaning of the APA, 5 U.S.C. 702.

133. Defendants actions and omissions set forth herein are arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedures required by law within the meaning of the APA, 5 U.S.C. 706(1) & (2)(A), and should therefore be declared unlawful and set aside by this Court.

134. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412.

COUNT III

Violation of NEPA

Failure to Meet Stated Purpose and Need

135. Plaintiffs hereby reallege and incorporate the preceding paragraphs.

136. NEPA requires that every major federal action state the purpose(s) and need(s) which the action is intended to meet. 40 C.F.R. 1502.13.

137. The stated purposes and needs for the OCFR project are to manage forest stands to reduce fuels accumulations and improve forest health around the community of Orleans, California, while enhancing cultural values associated with the Ceremonial District and Cultural Areas.

138. The OCFR project implementation included activities which were beyond and outside the scope of review and approval for the OCFR project and its stated purposes and needs.

139. Defendants' conclusion that the OCFR project will meet its stated purposes and needs is unsupported.

140. Plaintiffs have suffered legal wrongs because of the Defendants' actions and omissions as set forth herein and are adversely affected and aggrieved by this agency action within the meaning of the APA, 5 U.S.C. 702.

141. Defendants actions and omissions set forth herein are arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedures required by law within the meaning of the APA, 5 U.S.C. 706(1) & (2)(A), and should therefore be declared unlawful and set aside by this Court.

142. Plaintiffs are entitled to their reasonable fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412.

COUNT IV

Violation of NEPA

Failure to Prepare a New EIS

143. Plaintiffs hereby reallege and incorporate the preceding paragraphs

144. NEPA requires all federal agencies to prepare a detailed EIS on every proposal for a major federal action which may significantly affect the quality of the human environment. 42 U.S.C. 4332(2)(c).

145. The EIS must contain a detailed discussion of environmental impacts of the project (40 C.F.R. 1502.16) and of alternatives (40 C.F.R. 1502.14).

146. The OCFR project as implemented is a major federal action which may significantly affect the environment, as detailed in this complaint, which is different from the project as described in the OCFR FEIS.

147. NEPA requires the government to prepare a new NEPA analysis or update its NEPA analysis with new information about environmental impacts from the project when that information comes to light prior to completion of the project.

148. The changes to the project raise new information about the project's environmental impacts, and/or constitute a new project, either of which requires new NEPA

analysis.

149. Defendants must prepare a new and/or supplemental EIS for the OCFR project as implemented, and have failed to do so.

150. Defendants' failure to prepare a new EIS or supplemental EIS for this timber sale is arbitrary, capricious, not in accordance with law, and without observance of procedures required by law, within the meaning of the APA, 5 U.S.C. 706

151. Plaintiffs have suffered legal wrongs because of the defendants' actions and omissions as set forth herein and are adversely affected and aggrieved by this agency action within the meaning of the APA, 5 U.S.C. 702.

152. Defendants actions and omissions set forth herein are arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedures required by law within the meaning of the APA, 5 U.S.C. 706(1) & (2)(A), and should therefore be declared unlawful and set aside by this Court.

153. Plaintiffs are entitled to their reasonable fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412.

COUNT V

Violation of HFRA

Failure to Maintain or Restore Old Growth Forests

154. Plaintiffs hereby reallege and incorporate the preceding paragraphs.

155. Section 102(e)(2) of the HFRA requires that:

In carrying out a covered project, the Secretary shall fully maintain, or contribute toward the restoration of, the structure and composition of old growth stands according to the pre-fire suppression old growth conditions characteristic of the forest type, taking into account the contribution of the stand to landscape fire adaptation and watershed health, and retaining the large trees contributing to old growth structure.

16 U.S.C. 6512(e)(2).

156. The Healthy Forests Initiative and HFRA Interim Field Guide page 7 state that the legislation "[r]equires HFRA projects on NFS land maximize retention of larger trees in areas other than old-growth stands, consistent with the objective of restoring fire-resilient stands and protecting at-risk communities and federal lands."

157. Reduction of the structure and composition of an old-growth stand is contrary to these mandates.

158. The OCFR project as approved and implemented will degrade NSO nesting and roosting habitat, which would remove old-growth habitat characteristics and structure from these forest stands.

159. Defendants failed to establish the structure and composition of pre-fire suppression old growth conditions to be maintained or restored.

160. Defendants' project allows harvesting of old-growth trees.

161. Plaintiffs have suffered legal wrongs because of the Defendants' actions and omissions as set forth herein and are adversely affected and aggrieved by this agency action within the meaning of the APA, 5 U.S.C. 702.

162. Defendants' actions and omissions set forth herein are arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedures required by law within the meaning of the APA, 5 U.S.C. 706(1) & (2)(A), and should therefore be declared unlawful and set aside by this Court.

163. Plaintiffs are entitled to their reasonable fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412.

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COUNT VI

Violation of APA -- Failure to Comply With Resolution Agreement Reached under the HFRA

164. Plaintiffs hereby reallege and incorporate the preceding paragraphs.

165. Pursuant to the HFRA, the Secretary of Agriculture promulgated regulations "to establish a predecisional administrative review process" that "serve[s] as the sole means by which a person can seek administrative review regarding an authorized hazardous fuel reduction project on Forest Service land." 16 U.S.C. 6515(a)(1).

166. Those regulations are codified at 36 C.F.R. 218.11, and provide as follows:

Resolution of objections

(a) Meetings. Prior to the issuance of the reviewing officer's written response, either the reviewing officer or the objector may request to meet to discuss issues raised in the objection and potential resolution. The reviewing officer has the discretion to determine whether or not adequate time remains in the review period to make a meeting with the objector practical. All meetings are open to the public.

(b) Response to objections

(1) A written response must set forth the reasons for the response, but need not be a point-by-point response and may contain instructions to the responsible official, if necessary. In cases involving more than one objection to a proposed authorized hazardous fuel reduction project, the reviewing officer may consolidate objections and issue one or more responses.

(2) There must be no further review from any other Forest Service or USDA official of the reviewing officer's written response to an objection.

167. The regulations go on to provide as follows:

Timing of authorized hazardous fuel reduction project decision

(a) The responsible official may not issue a ROD or DN concerning an authorized hazardous fuel reduction project subject to the provisions of this subpart until the reviewing officer has responded to all pending objections.

36 C.F.R. 218.12.

168. Plaintiffs timely filed an Objection pursuant to these regulations, and the parties thereafter reached a Resolution Agreement in which the Forest Service agreed to: (1) drop late-successional unit 146; (2) seek additional hardwood release treatment opportunities with the Partnership's consent; (3) grant the Partnership access to project files, budgets, GIS information and maps; (4) explore options for a future stewardship plan; (5) discuss opportunities for stewardship implementation; (6) allow the Partnership to provide input on project treatment sequence; (7) notify and meet with the Partnership to discuss environmental concerns during implementation; (8) address any environmental concerns about cultural issues during implementation with the Karuk Tribe on a government-to-government basis; (9) notify the Partnership of any survey results for wildlife; and (10) establish a collaborative multi-party monitoring plan.

169. As alleged herein, defendants have violated that Resolution Agreement.

170. The Forest Service abrogated the result of the collaborative effort by failing to implement agreements reached during the HFRA objection process and through lack of adherence to the project's stated purpose and need.

171. Plaintiffs have suffered legal wrongs because of the defendants' actions and omissions as set forth herein and are adversely affected and aggrieved by this agency action within the meaning of the APA, 5 U.S.C. 702.

172. Defendants' actions and omissions set forth herein are arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedures required by law within the meaning of the APA, 5 U.S.C. 706(1) & (2)(A), and should therefore be declared unlawful and set aside by this Court.

173. Plaintiffs are entitled to their reasonable fees, costs and expenses associated with

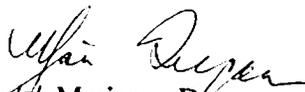
this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412.

RELIEF REQUESTED

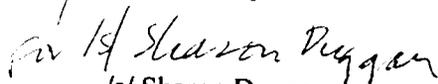
Plaintiffs seek an order:

- a) Declaring that defendants violated the NHPA and the APA;
- b) Declaring that defendants failed to comply with NEPA and the APA;
- c) Declaring that defendants failed to comply with HFRA and the APA;
- d) Enjoining defendants from undertaking any activities related to the OCFR project, unless and until defendants have complied with the NHPA, NEPA, HFRA, and the APA.
- e) Awarding plaintiffs their reasonable attorneys fees and costs incurred in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412; and
- f) Granting plaintiffs such additional relief as the Court deems just and equitable.

DATED May 11, 2010.


/s/ Marianne Dugan

Marianne Dugan, *pro hac vice* pending
(Oregon State Bar no. 93256)
Lead Attorney for Plaintiffs


/s/ Sharon Duggan

Sharon Duggan, CSB #105108
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