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10 APPEAL TO THE REGIONAL FORESTER OF
11 THE UNITED STATES FOREST SERVICE
12

13 **In the Matter of the Decision of Forest Supervisor**
14 **Gloria D. Brown to Approve the Record of**
15 **Decision and the Final Environmental Impact**
16 **Statement for Oil and Gas Leasing in Los Padres**
National Forest

Appeal No.

17 PEOPLE OF THE STATE OF CALIFORNIA, EX
18 REL. BILL LOCKYER, ATTORNEY GENERAL
19

20 **NOTICE OF APPEAL**

21 Decision Appealed: The People of the State of California, ex rel. Bill Lockyer
22 (“Attorney General”) appeal the Record of Decision for Oil and Gas Leasing in Los Padres
23 National Forest (“ROD”) signed by Forest Supervisor Gloria D. Brown on July 15, 2005 and the
24 Final Environmental Impact Statement for Oil and Gas Leasing in Los Padres National Forest
25 (“FEIS”) published on August 2, 2005. This Notice of Appeal is filed pursuant to 36 C.F.R. part
26 215.8 (formerly 36 C.F.R. part 217.)
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I. INTRODUCTION

1. This is especially true, since the expectation is that the Forest Plan for Los Padres will simply incorporate the instant Oil and Gas Drilling Plan, without independently conducting the balancing of interests required by NFMA of the elements of a Forest Plan.

Attorney General's Appeal and Statement of Reasons

1 Second, this project presents significant potential risks to the viability of the California
2 Condor, a species that just two decades ago hovered on the brink of extinction and is now
3 making a recovery within Los Padres. Any plan for the best uses of the forest must have, at its
4 forefront, the impacts on the Condor recovery project. Third, the miles of new oil and gas
5 pipelines and new access roads that will be required present human health and environmental
6 impacts that have not been adequately analyzed. Balanced against these significant
7 environmental impacts is the minimal benefit of producing relatively small amounts of gas and
8 oil. There does not appear to be a pressing demand by bidders for leases in Los Padres^{2/} and the
9 amount of oil estimated to be present by the Forest Service is quite small.

10 The Attorney General's Office has a long history of participation in national forest
11 planning in California that reflects the importance of national forests and forest resources to the
12 people of this State. We have consistently supported comprehensive, regional planning
13 approaches designed to protect and preserve all the values of the national forest resources within
14 the State. Indeed, it may be that an ecosystem-based approach is the only one that would enable
15 the Forest Service to comply with all applicable environmental laws. *See, Seattle Audubon*
16 *Society v. Lyons*, 871 F.Supp. 1291, 1311 (W.D. Wash. 1994) ("Given the current condition of
17 the forests, there is no way the agencies could comply with the environmental laws *without*
18 planning on an ecosystem basis."), *aff'd, Seattle Audubon Society v. Moseley*, 80 F.3d 1401 (9th
19 Cir. 1996).

20 In determining that it must proceed with this leasing decision in advance of completion of
21 the forest plan amendment process already underway, the Forest Service is not complying with
22 applicable legal authority. Proceeding in this fashion is inconsistent with the purpose and
23 requirements of the NFMA and the regulations adopted pursuant to the Federal Onshore Oil and
24 Gas Leasing Reform Act of 1987 ("Reform Act"), codified at 36 C.F.R. Part 228 Subpart E.

25 In addition, this FEIS fails to adequately analyze a number of potential impacts of the
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27 2. Other than the old 29 lease applications that were "grandfathered" at the time of the
28 Reform Act, there have only been six "Expressions of Interest." FEIS at p. 1-8.

1 leasing proposal, including the impacts of constructing new oil and gas pipelines (including the
2 possibility of catastrophic spills) and building new access roads, as well as the effects of
3 additional drilling in the Sespe High Oil and Gas Potential Area (“HOGPA”) on the California
4 Condor, in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et*
5 *seq.*

6 **II. ISSUES ON APPEAL**

7 **A. Identifying specific lands for leasing prior to completion of the revised Forest**
8 **Plan is inconsistent with the purpose and requirements of the NFMA.**

9 At the same time that it has released this FEIS, the Forest Service is in the midst of a
10 multi-year process – commenced in 1999 after years of assessment and analysis – to revise and
11 amend the current Los Padres National Forest Land and Resource Management Plan ("Forest
12 Plan"), as part of a Southern California “Conservation Strategy.” The strategy is designed to
13 identify how all uses of forest land can be accommodated and at the same time provide regional
14 ecosystem health and protection of endangered and sensitive species.

15 The strategy includes updating forest plans for the Angeles, Cleveland, and San
16 Bernardino National Forests, as well as for Los Padres, because the Forest Services’ analytical
17 studies have identified a number of areas where the existing forest plans do not adequately
18 protect threatened, endangered and sensitive species. 66 Fed. Reg. 48856. A draft EIS to
19 support the revised forest plans was released last summer. (Our Office provided comments on
20 the this draft EIS in August 2004.)

21 Given the extensive scientific and legal record the Forest Service has developed in
22 support of the need to revise the Forest Plan in order to develop consistent and appropriate
23 management direction for Los Padres, a decision to commit particular lands to oil and gas
24 development before the new management prescriptions are in place is, from a planning
25 perspective, premature and illogical. Such an approach is directly contradictory to the purpose
26 and requirements of NFMA. There is no reason to rush into oil and gas leasing decisions when a
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1 final revised Forest Plan is imminent.^{3/}

2 **B. The project does not comply with forest planning requirements.**

3 It is through the forest planning process required by the NFMA and its implementing
4 regulations (36 C.F.R. Part 219) that the Forest Service determines whether the use of the forest
5 lands for the production of oil and gas is the best use, as compared to all the other possible
6 values for the same lands, including protection of wildlife, preservation of aesthetic resources,
7 and recreational uses. The statutory scheme set forth in the NFMA is predicated on the
8 development of forest plans that comprehensively balance competing uses of forest lands. *See,*
9 *e.g.*, 16 U.S.C. § 1600(3) (to serve the national interest, national forest management must be
10 “based on a comprehensive assessment of present and anticipated uses, demand for, and supply
11 of renewable resources from the Nation’s . . . forests and rangelands, through . . . coordination of
12 multiple use and sustained yield opportunities . . . and public participation . . .”); 16 U.S.C. §
13 1604(f)(1) (plans developed under the NFMA “shall form one integrated plan for each unit of the
14 National Forest System”); *see, also*, 16 U.S.C. § 531(a) (resources of national forests shall be
15 utilized in the combination that best meets the needs of the American people).

16 Likewise, the implementing planning regulations require development of a
17 comprehensive planning framework, and consistency of the site-specific decisions with that
18 framework. *See, e.g.*, 36 C.F.R. § 219.2 (the “first priority for planning . . . is to maintain or
19 restore ecological sustainability of national forests and grasslands to provide for a wide variety
20 of uses, values, products, and services”); 36 C.F.R. § 219.7 (“Plan decisions guide or limit uses
21 of National Forest System resources and provide the basis for future agency action . . . [P]lan
22 decisions provide a framework for authorizing site-specific actions that may commit resources. .
23 . In making decisions, [the Forest Service] should seek to manage . . . resources in a combination
24 that best serves the public interest without impairment of the productivity of the land . . .”).

26 3. The revised Forest Plan will be finalized “no earlier than Fall 2005.” FEIS at 1-15.

1 What the Forest Service proposes in deciding to lease specific lands prior to completion
2 of ongoing forest plan amendments is directly contrary to this statutory and regulatory scheme.
3 Rather than making decisions about forest-wide oil leasing and its impacts in the context of a
4 balancing of the competing demands upon Los Padres, the Forest Service has improperly
5 undertaken a separate process, divorced from consideration of all the information and factors
6 currently being simultaneously evaluated in the update process. *Nevada Land Ass'n v. U.S.*
7 *Forest Service*, 8 F.3d 713, 719 (9th Cir. 1993) (the NFMA “directs the [Forest] Service to
8 manage conflicting uses of forest resources”). This approach is particularly improper given the
9 acknowledged inadequacies of the existing plan. 66 Fed. Reg. 48856.

10 The need to wait for the revision to the Forest Plan for Los Padres is no mere procedural
11 hurdle. It is the Forest Management Plan that provides a full discussion of the balancing of the
12 competing demands upon national forests. *Idaho Conservation League v. Mumma*, 956 F.2d
13 1508, 1511 (9th Cir. 1992). This includes taking into consideration the evolving social and
14 economic demands upon the forest. 36 C.F.R. § 219.1(b)(3). It is through the forest planning
15 process required by the NFMA that the Forest Service determines the best use of the forest lands
16 in relation to all possible values for the same lands, including protection of biological and
17 aesthetic resources and recreational uses.

18 There is no valid reason for circumventing the forest planning process. The Forest
19 Service has admitted that the amount of oil estimated to be present in Los Padres under the most
20 optimistic development scenario is quite small. Frequently Asked Questions at P. 3, Q 18 & 19.
21 There appears to be scant demand for these leases by bidders. Nonetheless, the Forest Service is
22 proposing to irretrievably commit specific areas to oil and gas development, in the absence of
23 full information, thereby unnecessarily foreclosing many other options for the uses of those
24 lands. By proceeding in this fashion, the Forest Service has failed to comply with the NFMA
25 and has deprived the public of a meaningful opportunity to evaluate the full impacts of the
26 decision. *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987).

1 **C. The Forest Service is not legally compelled to authorize oil and gas leasing in**
2 **advance of the currently ongoing Forest Plan update.**

3 The Forest Service believes that it is required to be “proactive” in analyzing lands
4 available for leasing for oil and gas drilling. FEIS at p. 1-6. Apparently, Los Padres was
5 identified as a “high priority” for study in 1990 because of historical oil and gas production that
6 had occurred in some areas of the Forest. Frequently Asked Questions at p. 1, Q-1. From the
7 documentation supporting the leasing proposal, it appears that the Forest Service believes it is
8 compelled to proceed with the leasing decision at this time, perhaps because of a Wyoming
9 federal district court case interpreting the Energy Security Act of 1980, *Mountain States Legal*
10 *Foundation v. Hodel*, 668 F.Supp. 1466, 1472 (D.Wyo. 1986).

11 This belief, however, is misplaced; *Mountain States Legal Foundation* does not compel
12 this leasing decision for two reasons. First, the *Mountain States* case is distinguishable on its
13 facts, as the Forest Service is not faced with a similar situation with respect to Los Padres
14 leasing. Second, the case was decided prior to the effective date of the Reform Act and its
15 implementing regulations, and these regulations now expressly *require* consistency with forest
16 plan requirements before the Forest Service may make decisions about leasing specific lands.
17 There, plaintiffs challenged a decision to suspend and delay mineral leasing pending the
18 completion of the initial forest plan required under the NFMA. *Mountain States Legal*
19 *Foundation v. Hodel*, 668 F.Supp. at 1469. The court found that the suspension violated the
20 Energy Security Act’s requirement to process pending applications for leases notwithstanding
21 the “current status” of a forest plan being prepared under the NFMA. *Id.* at 1472.

22 The Energy Security Act of 1980, however, was passed only four years after the NFMA,
23 at a time when the first generation of forest plans under the NFMA had not yet been prepared.
24 Although no direct legislative history of the relevant section from the 1980 legislation appears
25 available, it is reasonable to conclude that there was likely a Service-wide backlog of
26 uncompleted plans only four years following enactment of the comprehensive requirements
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1 contained in the NFMA. Indeed, the language of the NFMA itself recognizes that it will take a
2 number of years to implement the planning statute's mandate. 16 U.S.C. § 1604(c) (The
3 Secretary "shall attempt to complete [the incorporation of standards and guidelines required
4 under the NFMA] for all . . . units by no later than September 30, 1985."). The situation in 1986,
5 when *Mountain States* was decided, is very different from here, where not only does the initial
6 NFMA plan for the Los Padres already exist, but a comprehensive update of the management
7 direction that will analyze appropriate land uses, including oil and gas development, is underway
8 and nearing completion at the same time as the separate leasing analysis.

9 In addition, in *Mountain States*, the Forest Service had actually revoked already issued or
10 approved leases to await the outcome of the forest planning.^{4/} *Mountain States v. Hodel*, 669
11 F.Supp. at 1471-2. Thus, the court rejected the Forest Service's argument that it was
12 "processing" the leases in the context of completing the forest plan. Here, however, the Forest
13 Service is not suspending already approved leases, but is simply undertaking the leasing decision
14 analysis at the same time as the forest plan revision. Nothing in *Mountain States* requires that
15 the Forest Service must process lease applications by conducting the leasing analysis in a
16 separate document, on a separate, but parallel, planning track. The issue here is not whether it is
17 proper to suspend leasing pending the development of a plan, but whether the leasing analysis
18 must be in a separate document on its own track or, instead, must be part of a comprehensive
19 forest plan re-evaluation. Indeed, as set forth above, the NFMA requires that all conflicting uses
20 of forest resources be balanced in an integrated plan to achieve the best use. Even the court in
21 *Mountain States* recognized that an appropriate resolution of possibly contradictory statutes
22 requires flexibility in applying statutory language: "[T]he requirements of the various federal
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24 4. In *Mountain States*, the Regional Forester apparently suspended leases that, in some
25 cases, had already been forwarded to the BLM for issuance or had already been issued.
26 *Mountain States v. Hodel*, 668 F.Supp. at 1471-2. (In "suspending" the leases, the Forest Service
27 requested that BLM "return" already approved lease files and, in at least one case, actually
28 "revoke" an already issued lease.) The FEIS discloses nothing similar occurring here.

1 laws under which the [Forest Service] operate[s] must be coordinated to best effectuate all the
2 goals of the Acts.” *Mountain States v. Hodel*, 668 F.Supp. at 1473.

3 The Reform Act was passed in 1987, a year after *Mountain States* was decided. In 1990,
4 regulations were adopted to implement the Reform Act; these regulations reconcile conflicts
5 between leasing decisions and forest planning. Section 228.102(e) of the regulations now
6 expressly provide:

7 “At such time as *specific lands are being considered* for leasing, the Regional
8 Forester shall review the area or Forest-wide leasing decision and shall authorize
9 the Bureau of Land Management to offer specific lands for lease subject to . . .
10 verifying that oil and gas leasing of the specific lands . . . is *consistent with the*
11 *Forest land and resource management plan.*”

12 36 C.F.R. sec 228.102(e) (emphasis added). These regulations were adopted ten years later than
13 the Energy Security Act, at a time when Los Padres (and other forests) had adopted completed
14 plans under the NFMA.

15 This FEIS serves as the basis for the first two steps of the leasing process: (1) the analysis
16 of lands available for leasing; and (2) the decision to offer specific lands for leasing. FEIS at p.
17 1-6. Thus, the section 228.102(e) consistency requirement is applicable to this leasing decision
18 and, unlike in *Mountain States*, the Forest Service is not free to ignore the status of the forest
19 plan in deciding which specific lands may be leased.^{5/}

22 5. *Mountain States* is questionable authority in another regard. The court there also held
23 – relying on the earlier case of *Mountain States Legal Foundation v. Andrus*, 499 F.Supp. 383
24 (D.Wyo. 1980) – that the failure to process lease applications was an unlawful "withdrawal" of
25 public land in violation of the Federal Land Policy and Management Act of 1982, 43 U.S.C.
26 section 1714. The holding of the *Andrus* case, however, was roundly criticized and ultimately
27 rejected by the Ninth Circuit in *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229-30 (9th
28 Cir. 1988), *cert. denied* 489 U.S. 1066 (1989). Thus, a significant basis for the court’s
invalidation of the government’s action has been overruled.

1 **D. The FEIS fails to adequately analyze potential environmental impacts in**
2 **violation of the National Environmental Policy Act.**

3 Under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*,
4 decisions undertaken by federal agencies must be based on complete analysis so that they are
5 fully informed and well-considered. *Vermont Yankee Nuclear Power Corp. v. Natural*
6 *Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). This FEIS falls far short of this
7 standard, particularly with respect to its analysis of impacts from pipeline spills, the increase in
8 infrastructure within and adjacent to the Forest boundaries, and adverse impacts to the California
9 Condor.

10 One of the most significant flaws in the FEIS is its failure to discuss, in more than
11 passing fashion, the potential impacts of ruptures, spills, and leaks from the oil and gas pipelines
12 that will be needed to link wells and tanks and to carry the product to refineries or markets, and
13 the disturbance to the natural setting caused by the construction of access roads. The production
14 of oil and gas from the new Los Padres leasing will not only necessarily result in the
15 construction of new pipelines, but will increase the use of existing ones.

16 While the FEIS has several one-sentence references at various places within its pages
17 regarding the possibility of leaks from pipelines, none of these brief statements indicate or
18 analyze the potential seriousness of these spills. FEIS at p. 4-135, 4-136. The risk of spills and
19 leaks is more than theoretical. According to an article published earlier this year in the
20 *Washington Monthly*, the United States Office of Pipeline Safety counted nearly 6,400 pipeline
21 accidents that occurred in the United States between 1986 and August of 2001, causing 376
22 deaths, 1,799 injuries and \$1,140,697,582 in property damage. Charles Pekow, *Washington*
23 *Monthly*, "Lines of Fire," January 1, 2002. The increased potential for a serious accident from a
24 new pipeline, whether within or next to Los Padres -- including the possible physical danger to
25 recreational users and residents of the forest -- is a substantial human health risk of leasing
26 operations that simply has not been analyzed in the FEIS.

1 Spills from oil pipelines also present the possibility of environmental damage to water
2 bodies, wildlife, and other sensitive resources. Although a short statements in the FEIS refers to
3 spills, the discussion is extremely general, and is principally concerned with fires affecting
4 telephone poles, the possibility of the spillage of PCBs from the transformers on those poles, and
5 well blowouts. FEIS at pp. 3-128, 4-136. This discussion contains few specifics, and omits
6 mention of fire and explosion dangers f rom pipeline accidents. The FEIS does refer to using 40
7 C.F.R. Part 112 to establish oil spill prevention, control, and countermeasures plans, but defers
8 the specifics of what those plans will require by way of mitigation measures to later approval
9 processes. FEIS at p. 2-66. Because the environmental impacts analysis in the FEIS lacks detail,
10 the document’s discussion of mitigation of spill impacts is also lacking in meaningful specifics.
11 Instead, the FEIS discusses, in only a very general way, that the Oil Spill Contingency Plan for
12 Los Padres will be followed, and that operators will be required to prepare spill prevention plans.
13 FEIS at p. 2-66, 4-137.^{6/}

14 The construction and presence of infrastructure to support the drilling operations, in the
15 guise of wellheads, pads, tanks, access roads, and piping, will significantly alter the beauty of
16 large portions of the Forest. Los Padres provides “large natural appearing wildland landscapes
17 near major metropolitan areas,” with 93% of Los Padres landscape having “a natural
18 appearance.” FEIS 3-116. Los Padres is close to major metropolitan areas of Southern and
19 Central California, and provides recreational opportunities and refuge from the hectic nature of
20 urban life. This Oil and Gas Leasing plan will allow further interference with the quiet
21 enjoyment of this resource. Although the New Preferred Alternative will minimize the amount
22 of structures that will actually be built on forest lands, making three HOGPAs available for oil
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24 6. Further, although construction of roads and pipelines have potential for adverse
25 impacts on the soils and riparian resources of the forest, the mitigation of these impacts is
26 improperly deferred to the use of Best Management Practices to be developed in the future on a
27 site-specific basis. FEIS at p. 4-33, 4-34, 4-35.
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1 and gas exploration and development will bring drilling infrastructure right up to the borders of
2 the forest. The impact of oil and gas drilling on the edges of the forest, is an impact to the forest
3 and to the wildlife that lives within it, as well as to the ability to enjoy the quietude of its lands.
4 Nonetheless, this major impact to the enjoyment of Los Padres has not been addressed in the
5 FEIS, nor has mitigation for those impacts been discussed. This is particularly true, as portions
6 of Los Padres have already suffered “major” and “drastic” disturbances from the current ongoing
7 oil and gas drilling. FEIS at p. 3-126. Instead of discussing these impacts that will flow from
8 leasing forest lands for oil and gas production, the FEIS defers the discussion of these impacts to
9 areas at the boundaries of the forest, and any mitigation that might be available for these impacts,
10 to other future planning processes regarding development on private lands. FEIS at p. 4-58.
11 Although damage from such operations to the scenic beauty of the Forest, and in particular in the
12 Sespe HOGPA, is noted in the FEIS at p. 3-124, discussion of mitigation of impacts to address
13 the impacts of prospective oil and gas drilling within a half-mile of Los Padres is limited to
14 reference to land use restrictions in the HOGPA, such as the use of No Surface Occupancy
15 (“NSO”) restrictions. This will not address the scenic and noise impacts from access roads,
16 piping, well pads, and rigs that will result from drilling on land immediately adjacent to forest
17 lands while using leases in Los Padres.

18 It is a fundamental tenet of NEPA that federal agencies must take a “hard look” at
19 environmental consequences arising from proposed projects. *Id.* The FEIS’ cursory, generic
20 reference to the possibility of spills from oil production, and the blight caused by the existence of
21 oil drilling equipment at the boundaries of the Forest, does not meet this standard. The FEIS
22 must permit those who do not participate in its preparation to understand and meaningfully
23 consider the reasoning, premises, and data relied upon, so that a reasoned choice among different
24 courses of action can be made. *Friends of the River v. FERC*, 720 F.2d 93, 120 (D.C. Cir. 1983).

25 Another impact that is not adequately discussed is the impacts to the California Condor
26 from oil and gas drilling in its habitat. As the Forest Service is well-aware, it is only through the
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1 superhuman efforts of the U.S. Fish and Wildlife's captive breeding program that it may be
2 possible to bring this species back from the brink of extinction. There are now 44 free ranging
3 condors in the Forest. FEIS at p. 3-48. The proposed oil leasing puts the future success of this
4 effort in jeopardy. Four hundred acres of the Sespe HOGPA, which is proposed to be made
5 available for leasing in the ROD's New Preferred Alternative, has been designated as critical
6 habitat for the California Condor. FEIS at p. 3-48.

7 For mitigation of impacts to the California Condor, this FEIS relies almost exclusively on
8 the use of time and NSO restrictions that will be based on future surveys and future consultation
9 with the United States Fish and Wildlife Service. FEIS at p 4-59. This mitigation includes the
10 imposition of "BLM standard lease terms," which restrict land use or which provide notice.
11 These include NSOs in inventoried roadless areas and limited service use ("LSU") in other
12 sensitive areas. FEIS at p. 2-13 through 2-16. The FEIS also provides for "Threatened and
13 Endangered Species Information Notices." (TES Information Notice) Although the TES
14 Information Notice is offered as mitigation for the danger to Condors created by the oil and gas
15 drilling operations, it requires compliance with terms that are completely unrealistic to expect
16 from an oil drilling crew and merely underlines the vulnerability of the Condors to all aspects of
17 oil and gas drilling and the presence of people and their machinery in the Condor habitat. FEIS
18 at p. 2-18. For instance, the specific measures that might be required as a condition of approval
19 by BLM include the picking-up of *all* small bits of trash at the end of each day, or whenever
20 workers are not present onsite. Compliance with this requirement, while necessary to protect
21 Condors, is unlikely. The best protection for this endangered species may be to not lease the
22 lands in the Sespe HOGPA at all.

23 What is not analyzed in the FEIS is the fact that making this HOGPA available for oil
24 and gas exploration will attract infrastructure to the edge of the forest. Because the technical
25 limitation on slant drilling is 1/2 mile, any oil and gas drilling subject to the NSO requirements
26 must be done by slant drilling from nearby private or other public properties. FEIS at p.2-15.

1 Accordingly, the wells, well pads, roads and power lines will have to be set up 2600 feet or less
2 from the boundary of the forest. Condors do not limit themselves to such artificial boundaries,
3 and the impacts from the existence of this oil and gas drilling equipment so near the Condor
4 sanctuary must be analyzed in depth in the FEIS. Having failed to do so, the Forest Service has
5 not satisfied its obligation under NEPA to discuss possible mitigation in sufficient detail to
6 enable full disclosure of potential impacts and informed decision-making. *Robertson v. Methow*
7 *Valley Citizens Council*, 490 U.S. 332, 352 (1989.)

8 Besides providing for the imposition of NSOs and LSUs, the FEIS' only other mitigation
9 for impacts to the California Condor is future site-specific surveys and consultation with U.S.
10 Fish and Wildlife biologists. FEIS at p.4-59. It is not sufficient to state, as this FEIS does, that
11 the mitigation for biological impacts will be worked out under consultation required by the
12 Endangered Species Act at the time site-specific leasing decisions are made. An FEIS
13 necessarily involves some degree of forecasting, and if discussion of environmental
14 consequences can be deferred based on a promise to perform a comparable analysis in
15 connection with some later site-specific projects, no environmental consequences would ever
16 need to be addressed in an EIS. *Kern v. United States Bureau of Land Management*, 284 F.3d
17 1062, 1071 (9th Cir.2002). For example, without a reasonably detailed evaluation of the likely
18 success of various measures available to mitigate the impacts to Condors caused by this new
19 development adjacent to the Sespe HOGPA, it is impossible to evaluate and make a decision
20 about the potential harms and risks of this project to the California Condor. It may be that the
21 project is simply inconsistent with the Condor's survival. The viability of possible mitigation
22 measures– and thus of the Condor itself – needs to be assessed now.

23 This attempt by the Forest Service to defer analysis and consideration of mitigation to
24 later site-specific environmental review and to the Endangered Species Act consultation process
25 does not meet the requirements of NEPA. The Ninth Circuit has made it clear that where impacts
26 are reasonably foreseeable, it is not appropriate to defer analysis to a future date. *Neighbors of*
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1 *Cudahy Mountain v. U.S. Forest Service*, 137 F.3d. 1372, 1380 (9th Cir. 1998). This is true even
2 where, as here, the FEIS at issue is the first-tier environmental document of a multi-stage
3 process. The standards set forth in *State of California v. Block*, 690 F.2d. 753 (9th Cir. 1982) are
4 applicable here. There, plaintiffs challenged a decision to designate 36 million acres of national
5 forest land as “non-wilderness” on the grounds that the EIS did not contain enough site-specific
6 data to support the designation. *Id.* at 760. The Forest Service argued that, since the EIS
7 described only the first step of a multi-step national project, a generalized discussion of
8 environmental impact was sufficient. *Id.* at 761-2. The court disagreed, on the basis that the
9 decision to commit the areas to non-wilderness status would make an irreversible and
10 irretrievable commitment of resources that required environmental scrutiny at the time the
11 decision is made to constrain future choices. *Id.* at 762-3.

12 In limited circumstances, where future choices will not be constrained, the courts allow
13 some deferral of impact analysis. *See Northern Alaska Environmental Center v. Lujan*, 961 F.2d
14 886, 891 (9th Cir. 1992) (limited mitigation discussion was permissible, because the agency
15 would make no decision that could negatively affect the environment without additional
16 environmental review). In contrast to *Lujan*, this FEIS is intended to be used by the Forest
17 Service to commit specific lands to be offered for lease, as well as what lease stipulations should
18 be applied to which lands. FEIS at pp. 1-8 and 1-11. The BLM will be notified of the lands
19 available for lease, and will then offer them for competitive bid. Thus, this proposal will alter
20 the balance of land uses in Los Padres forest-wide, necessarily foreclosing some other uses of the
21 areas offered for leasing. Under *Block*, these impacts and the measures to mitigate these
22 impacts, must be analyzed at the time the decision is made, *i.e.*, in this FEIS, in order to foster
23 informed decision-making and informed public participation. *Block*, 690 F.2d at 761.

24 In *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43 (D.C. Cir. 1999), the
25 Court denied an appeal from several environmental groups who had challenged an EIS for an oil
26 and gas leasing plan for the Shoshone National Forest on grounds that it was not sufficiently site-

1 specific in its NEPA analysis. That case can be distinguished, however, from the instant
2 situation. First, the plan at issue in the *Wyoming Outdoor Council* case did not identify specific
3 areas available for leasing; rather, it identified broad categories of lands. *See, Wyoming Outdoor*
4 *Council v. Dombeck*, 148 F.Supp. 2d 1,5 (D.D.C. 2001). Further, the appellate court was not
5 approving the analysis in the EIS; rather, it simply found that it did not have jurisdiction to hear
6 this challenge to the EIS under NEPA. *Wyoming Outdoor Council v. U.S. Forest Service*, 165
7 F.3d at 49. Because the Forest Service could still do additional NEPA compliance, the court
8 found that there had not yet been an irreversible and irretrievable commitment of resources
9 necessary to establish ripeness. *Id.*

10 Because the Los Padres FEIS will commit specific lands within Los Padres to oil and gas
11 development, possibly foreclosing wilderness and wildlife habitat uses, and because the project
12 could negatively impact Condor habitat, NEPA requires the Forest Service to conduct a much
13 more thorough analysis of the potential harm to this endangered species from this project, and of
14 measures to mitigate that harm. Particularly in light of the huge amount of emotional and
15 financial resources that have been invested to attempt to save the Condor, more detail is required
16 to enable full public disclosure. Failure to provide information about these major potential
17 environmental consequences from oil leasing activity means that this FEIS fails to meet NEPA
18 requirements to provide the public with full environmental disclosure. *Silva v. Lynn*, 482 F.2d
19 1282, 1285 (1st Cir. 1973).

20 An FEIS must “set forth sufficient information for the general public to make an
21 informed evaluation . . . and for the decision maker to consider fully the environmental factors
22 involved and to make a reasoned decision after balancing the risks of harm to the environment
23 against the benefits to be derived from the proposed action.” *Sierra Club v. United States Army*
24 *Corps of Engineers*, 701 F.2d 1011, 1029-1030 (2d Cir. 1983). NEPA requires that the FEIS
25 contain a reasonably thorough discussion of the significant aspects of the probable consequences
26 of an action. *Oregon Natural Resources Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). An
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28

1 FEIS is invalid if the information and analysis it contains is "too vague, too general and too
2 conclusory." *Silva*, 482 F.2d at 1285. The FEIS for Oil and Gas Leasing in Los Padres is too
3 vague, too general, and too conclusory, and therefore should be invalidated.

4 **CONCLUSION**

5 Since 1999, the Forest Service has been working to prepare an update to the Los Padres
6 Forest Plan that not only seeks to fill some key gaps in the existing plan, but also seeks to
7 achieve consistent management direction across several southern California forests in order to
8 protect and sustain particularly vulnerable and unique ecological communities. The government
9 has also undertaken superhuman efforts to attempt to save the critically endangered California
10 Condor. The proposal to lease specific lands for oil and gas development now, without the
11 benefit of the planning process required under the NFMA and without the full information
12 required under NEPA, threatens to seriously jeopardize these ongoing efforts. Because the
13 limited amount of oil and gas that is, theoretically, obtainable from the Los Padres does not and
14 cannot justify action in contravention of applicable environmental laws, we request that the
15 Forest Service withdraw the ROD and its supporting FEIS, and address the issues of oil and gas
16 leasing in the Forest Management Plan for Los Padres, where it can properly balance the
17 competing interests in forest lands.

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