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U.S. DISTRICT COURT  
SAN FRANCISCO, CALIFORNIA

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15 Attorneys for Plaintiffs

16 IN THE UNITED STATES DISTRICT COURT  
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
18 SAN FRANCISCO DIVISION

MHP

19 CENTER FOR BIOLOGICAL DIVERSITY,  
20 LOS PADRES FORESTWATCH, SIERRA )  
21 CLUB, DEFENDERS OF WILDLIFE, )  
22 CALIFORNIA NATIVE PLANT SOCIETY, )  
23 Plaintiffs, )

CV 08

Case No.

1278

24 COMPLAINT FOR DECLARATORY  
25 AND INJUNCTIVE RELIEF

26 v. )  
27 U.S. FISH AND WILDLIFE SERVICE, )  
28 NATIONAL OCEANIC AND )  
ATMOSPHERIC ADMINISTRATION )  
NATIONAL MARINE FISHERIES SERVICE, )  
and U.S. FOREST SERVICE, )

(Administrative Procedure Act Case, 5 U.S.C. §§  
551 *et seq.*; and Endangered Species Act,  
16 U.S.C. §§ 1531, *et seq.*)

Defendants. )

1 **INTRODUCTION**

2 1. This is a civil action for declaratory and injunctive relief regarding threatened and  
3 endangered species that reside on the four national forests located in southern California - the  
4 Cleveland, Angeles, San Bernardino, and Los Padres National Forests. Plaintiffs challenge (1) the  
5 September 15, 2005, “Biological and Conference Opinions on the Revised Land and Resource  
6 Management Plans for the Four Southern California National Forests,” prepared by the U.S. Fish and  
7 Wildlife Service; (2) the September 16, 2005, “Biological Opinion” for the Los Padres National Forest  
8 and Cleveland National Forest, prepared by the National Oceanic and Atmospheric Administration  
9 National Marine Fisheries Service; and (3) the U.S. Forest Service’s decision to rely on those  
10 “biological opinions” and failure to complete consultation with the U.S. Fish and Wildlife Service and  
11 National Marine Fisheries Service regarding the environmental impacts of the revised Land and  
12 Resource Management Plans (“forest plans”) for the four southern California national forests on  
13 threatened and endangered species.

14 2. Plaintiffs seek a declaration that the two “biological opinions” prepared for the revised  
15 southern California forest plans do not meet the minimum requirements for biological opinions, as  
16 required under the Endangered Species Act (“ESA”), and that the Forest Service’s reliance on these  
17 “biological opinions” therefore also violates the ESA. Plaintiffs request appropriate injunctive relief  
18 as necessary to protect the threatened and endangered species on the four southern California national  
19 forests until such time as the U.S. Fish and Wildlife Service and National Marine Fisheries Service  
20 prepare legally sufficient biological opinions and incidental take statements for these four national  
21 forests.

22 **JURISDICTION**

23 3. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 and 28 U.S.C. § 1346,  
24 because this action involves the United States as a defendant, and it arises under the laws of the United  
25 States, including the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.*; and the ESA, 16  
26 U.S.C. §§ 1531, *et seq.* An actual, justiciable controversy exists between Plaintiffs and Defendants.  
27 The requested relief is proper under 28 U.S.C. §§ 2201-02, 5 U.S.C. § 706, and 16 U.S.C. § 1540(g).  
28

1 The challenged agency actions are final and subject to this Court’s review under 5 U.S.C. §§ 702, 704,  
2 and 706; and 16 U.S.C. § 1540(g).

3 **VENUE AND INTRADISTRICT ASSIGNMENT**

4 4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). Plaintiff Sierra Club has  
5 its primary office in San Francisco. Plaintiff Center for Biological Diversity has an office in San  
6 Francisco. Additional Plaintiffs have members and staff that work or reside within the district.  
7 Defendants also have offices within the district. Real property is not the subject of this action.  
8 Assignment is proper in this district and division for the same reasons. Civil L.R. 3-2, 3-5.

9 **PARTIES**

10 5. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a conservation organization  
11 with over 40,000 members nationwide. The Center works through science, law, and creative media to  
12 secure a future for all species, great or small, hovering on the brink of extinction. The Center has  
13 offices in California, including San Francisco, Shelter Cove, San Diego, Los Angeles, Sacramento,  
14 and Joshua Tree. The Center was significantly involved in the public process regarding the revision of  
15 the forest plans for the four southern California national forests, and regularly submits comments and  
16 is involved in projects that are proposed on these four national forests.

17 6. Plaintiff LOS PADRES FORESTWATCH is a non-profit conservation organization  
18 dedicated to protecting and restoring public lands along California's central coast using community  
19 involvement, scientific collaboration, innovative field work, and legal advocacy. Los Padres  
20 ForestWatch is a locally based and citizen supported watchdog group for the Los Padres National  
21 Forest with approximately 700 members throughout the state of California. Members of Los Padres  
22 ForestWatch include outdoor enthusiasts, hikers, mountain bikers, biologists, horseback riders, river  
23 runners, backcountry travelers, anglers, hunters, bird watchers, rock climbers, business leaders, and  
24 others who depend on a healthy forest and seek to prevent environmental damage caused by uses of  
25 public lands that are contrary to environmental protection laws. Los Padres ForestWatch staff and  
26 members visit the Los Padres National Forest for recreation, scientific, and aesthetic purposes, and  
27 degradation of these lands impairs their use and enjoyment of the forest.

1           7.       Plaintiff SIERRA CLUB is a non-profit, public interest environmental organization  
2 headquartered in San Francisco, whose mission is to explore, enjoy and protect the planet. The Sierra  
3 Club has over 700,000 members nationally, with over 80,000 residing in southern California.

4           8.       Plaintiff DEFENDERS OF WILDLIFE (“Defenders”) is dedicated to the protection of  
5 all native wild animals and plants in their natural communities. Defenders focuses its programs on  
6 what scientists consider two of the most serious environmental threats to the planet: the accelerating  
7 rate of extinction of species and the associated loss of biological diversity, and habitat alteration and  
8 destruction. Defenders has more than 535,000 members nationwide, of which over 70,000 are in  
9 California.

10          9.       Plaintiff CALIFORNIA NATIVE PLANT SOCIETY (“CNPS”) is a non-profit  
11 organization of more than 10,000 laypersons and professional botanists organized into 32 chapters  
12 throughout California. The mission of CNPS is to increase understanding and appreciation of  
13 California’s native plants and to conserve them and their natural habitats, through education, science,  
14 advocacy, horticulture, and land stewardship.<sup>1</sup>

15          10.       Plaintiffs’ members and staff use and enjoy the four national forests of southern  
16 California for hiking, fishing, hunting, camping, photographing scenery and wildlife, and other  
17 vocational, scientific, research, educational, and recreational activities. Plaintiffs’ members and staff  
18 derive recreational, inspirational, religious, scientific, educational, and aesthetic benefit from their  
19 activities within these four national forests. Plaintiffs’ members and staff intend to continue to use and  
20 enjoy the four national forests of southern California frequently and on an ongoing basis in the future,  
21 including this spring and summer.

22          11.       The Plaintiff organizations and their members have a procedural interest in the proper  
23 and lawful management of the four national forests located in southern California.

24          12.       Among the areas of the four southern California national forests that Plaintiffs’  
25 members and staff use and enjoy include the De La Guerra, Nordhoff, and Condor Point areas in the

26 \_\_\_\_\_  
27 <sup>1</sup> The California Native Plant Society joins as a plaintiff in this case only as to those issues affecting  
28 vegetation.

1 Los Padres National Forest; the Arroyo Seco, Cucamonga, Red Mountain, Salt Creek, San Gabriel,  
2 Sheep Mountain, Fish Canyon, and Strawberry Peak Inventoried Roadless Areas found in the Angeles  
3 National Forest; the Cahuilla, Cactus Springs, Cahon, Circle Mountain, City Creek, Pyramid Peak, San  
4 Sevaine, Crystal Creek, Granite Peak, Horse Creek Ridge, Mill Peak, Heartbreak Ridge, Deep Creek,  
5 Rouse Hill, and Sugarloaf Inventoried Roadless Areas found in the San Bernardino National Forest;  
6 and the Barker Valley, Coldwater, Cutca Valley, Ladd, San Mateo Canyon, Sill Hill,  
7 Wildhorse/Morrell, Eagle Peak, and No Name Inventoried Roadless Areas in the Cleveland National  
8 Forest.

9           13. Plaintiffs' members and staff use and enjoy numerous areas of the four national forests  
10 in southern California that are known for supporting relatively high concentrations of endangered and  
11 threatened species, or for supporting the only known habitats for a particular endangered or threatened  
12 species. These areas include the Cuesta Ridge in the southern Santa Lucia Range of the Los Padres  
13 National Forest; the Lytle Creek and Cajon Wash area of the Angeles National Forest; Baldwin Lake,  
14 Holcomb Valley, and Deep Creek watershed and Mill Creek in the San Bernardino Mountains of the  
15 San Bernardino National Forest; the North Fork San Jacinto River watershed, Bautista Canyon, and  
16 Garner Valley in the San Jacinto Mountains of the San Bernardino National Forest; and Laguna  
17 Meadow in the San Diego Ranges of the Cleveland National Forest.

18           14. The aesthetic, recreational, scientific, educational, religious, and procedural interests of  
19 Plaintiffs and their members and staff have been and will continue to be adversely affected and  
20 irreparably injured by the U.S. Forest Service's reliance on the inadequate biological opinions for the  
21 four southern California national forests. These are actual, concrete and recognized injuries caused by  
22 Defendants' failure to comply with mandatory duties under the ESA and APA. The injuries would be  
23 redressed by the relief sought.

24           15. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS") is an  
25 agency within the U.S. Department of the Interior. It and its officers are responsible for administering  
26 the ESA, particularly regarding potential impacts to freshwater fish and wildlife species.



1 action agency with a “biological opinion” explaining how the proposed action will affect the species or  
2 its habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14.

3 23. If the expert agency concludes that the proposed action is likely to “jeopardize the  
4 continued existence of any [listed] species or result in the destruction or adverse modification of  
5 [critical] habitat,” 16 U.S.C. § 1536(a)(2), the biological opinion must outline “reasonable and prudent  
6 alternatives” that the expert agency believes will avoid that consequence. 16 U.S.C. § 1536(b)(3)(A);  
7 50 C.F.R. § 402.14(h).

8 24. If the expert agency concludes that the proposed action is not likely to result in  
9 jeopardy or adverse habitat modification, the expert agency must provide the action agency with an  
10 “incidental take statement.” 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The incidental take  
11 statement must: (1) specify the amount or extent of the incidental taking on the species, (2) specify the  
12 “reasonable and prudent measures” that the expert agency considers necessary or appropriate to  
13 minimize such impact, (3) set forth the “terms and conditions” that must be complied with by the  
14 action agency to implement the reasonable and prudent measures (including, but not limited to,  
15 reporting requirements); and (4) specify the procedures to be used to handle or dispose of any  
16 individual animals actually taken. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

17 25. The ESA requires that the action agency report back to the expert agencies on an  
18 action’s progress and its impacts on listed species, as specified in the incidental take statement, in  
19 order to monitor the impacts of incident take. 50 C.F.R. § 402.14(i)(3).

20 26. The action agency must immediately reinstate consultation with the expert agency if  
21 the amount or extent of incidental taking is exceeded. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

22 27. Section 9 of the ESA prohibits the unauthorized “take” of any endangered species of  
23 fish or wildlife. 16 U.S.C. § 1538(a)(1). This prohibition applies equally to threatened species, unless  
24 otherwise indicated by a species-specific rule promulgated by FWS or NMFS pursuant to Section 4(d)  
25 of the ESA. 50 C.F.R. § 17.31. The ESA broadly defines “take” to include harass, harm, pursue, hunt,  
26 shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. §  
27 1532(19).



1           35.     These four national forests provide a critical source of clean water for consumption,  
2 agriculture, and industry for many communities in southern California, and are thus integral to the  
3 regional economy.

4           36.     These four national forests are under increased pressure from recreation, including  
5 motorized recreation, due to their proximity to some of the most heavily populated areas of the  
6 country.

7           37.     There are approximately 3,712 miles of Forest Service roads on the four national  
8 forests in southern California, with an additional 1,612 miles of non-Forest Service roads on these  
9 national forests. The Forest Service conducts annual maintenance on close to 2,000 miles of roads on  
10 these four national forests.

11          38.     There are approximately 2,772 miles of trails that are open to non-motorized activities  
12 on the four national forests in southern California. There are approximately 1,000 miles of trails that  
13 are open to off-highway vehicles, with another 2,970 open areas for off-highway vehicle use.

14          39.     There are approximately 214 developed campgrounds on the four national forests in  
15 southern California.

16          40.     There are approximately 60 plant and animal species designated as threatened or  
17 endangered under the ESA that currently are found within the four national forests of southern  
18 California. A number of these species have been effectively extirpated from some portions of these  
19 four national forests.

20 II.     The Forest Plans for the Four Southern California National Forests

21          41.     The national forest system includes 192 million acres of land, and is comprised of 155  
22 national forests and 20 national grasslands. The National Forest Management Act (“NFMA”) sets  
23 forth a three-tiered management approach for the national forest system. At the highest tier, NFMA  
24 requires the Secretary of Agriculture to promulgate national regulations that govern the development  
25 of regional and site-specific plans. 16 U.S.C. § 1604(g). The second tier is the “land and resource  
26 management plan” (“forest plan”) that is prepared for each individual national forest or grassland. 16  
27 U.S.C. § 1604(a). The forest plans operate like zoning ordinances, defining the uses allowed in  
28

1 various areas of each forest, and setting goals and limits on various uses, such as logging and road  
2 construction. The third tier is the so-called “site-specific” projects, which are prepared to effect  
3 specific, on-the-ground actions. Site-specific projects must be consistent with both sets of higher-level  
4 rules, that is, both the applicable forest plan as well as the nationwide NFMA regulations. 16 U.S.C. §  
5 1604(i).

6 42. Forest plans make important long-term decisions that affect the location and extent of  
7 environmental impacts throughout a national forest, including setting land use allocations and  
8 establishing the standards and guidelines for the different allocations that guide and control site-  
9 specific actions.

10 A. The 1980s Forest Plans

11 43. The Forest Service completed forest plans for each of the four national forests in  
12 southern California between 1986 and 1989.

13 44. In 1989, there were approximately 17 species on these four national forests that were  
14 federally designated as threatened or endangered with extinction. Now, however, there are  
15 approximately 60 plant and animal species on these four national forests that are designated as  
16 threatened or endangered.

17 45. In 1998, the Center for Biological Diversity filed suit under the ESA regarding the  
18 failure of the Forest Service to consult with FWS over the potential impacts of the forest plans for  
19 these four national forests on threatened and endangered species. This lawsuit resulted in a settlement  
20 that mandated interim protections for many listed species while the Forest Service consulted with  
21 FWS regarding the potential impacts of the four forest plans on threatened and endangered species  
22 pursuant to the ESA. Under the terms of the agreement, the Forest Service was required to carry out  
23 specific actions to protect listed species and habitat in the four national forests of southern California.

24 B. Consultation on the 1980s Forest Plans, and the 2001 FWS Biological Opinion

25 46. As result of the 1998 Center for Biological Diversity lawsuit over the initial forest plans  
26 for the four southern California national forests, the Forest Service and FWS began consulting over the  
27 existing forest plans for the four national forests. The Forest Service formally initiated consultation on  
28

1 all four forest plans in 1999, and in 2001, FWS completed a biological opinion on the continued  
2 implementation of the four forest plans (“2001 FWS Biological Opinion”).

3 47. The 2001 FWS Biological Opinion for the continued implementation of the forest plans  
4 for the four southern California national forests included an “incidental take statement” (“ITS”).  
5 Within the ITS, the FWS determined that some Forest Service resource allocations and management  
6 actions could not be adequately addressed within the 2001 FWS Biological Opinion, including permit  
7 renewals for livestock grazing, the continued administration of special use permits, the continued  
8 administration of plans of operation for mining activities, some developed recreation activities, new  
9 resource management projects, and activities associated with responses to emergency situations.  
10 Within the ITS, the FWS also identified a number of actions and programs that would be covered by  
11 the ITS, including the use and maintenance of Forest Service roads and trails, the operation and  
12 maintenance of some recreation sites and facilities, the operation and maintenance of existing  
13 administrative facilities, the maintenance of existing fuelbreaks, and the non-commercial collection of  
14 forest products.

15 48. The ITS within the 2001 FWS Biological Opinion concluded that several listed species  
16 may be taken, through direct mortality or injury, as a result of the ongoing actions and programs on the  
17 national forest lands. Because FWS was unable to provide a reliable estimate of the numbers of  
18 individuals of each species that were likely to be taken, FWS established “take thresholds,” that, if  
19 reached or exceeded, would trigger the need to reinitiate consultation. If those levels were reached or  
20 exceeded, the Forest Service was required to immediately cease the activity that caused the take and  
21 contact FWS to review the activities resulting in take and determine if additional protective measures  
22 were required.

23 49. The ITS within the 2001 FWS Biological Opinion included several pages describing  
24 the activities and locations where incidental take may occur for various threatened and endangered  
25 species. For each threatened and endangered species, the ITS also set forth the annual incidental take  
26 thresholds, in terms of mortality, harassment, or habitat surrogates, for the programs and actions that  
27 were covered in the ITS.

1           50.     The ITS within the 2001 FWS Biological Opinion included a number of “reasonable  
2 and prudent measures” to minimize the incidental take of listed species, as well as numerous,  
3 mandatory “terms and conditions,” which were required in order to implement the reasonable and  
4 prudent measures.

5           51.     The Forest Service was required to contact FWS within 48 hours if any of the  
6 anticipated take thresholds were exceeded.

7           52.     The ITS within the 2001 FWS Biological Opinion included reporting requirements,  
8 which required the Forest Service to provide a written annual report to FWS each year. The annual  
9 report was required to include information concerning the efforts made by the Forest Service to  
10 comply with the terms and conditions, information on the number of individuals of listed species that  
11 were killed or injured, information regarding the activities conducted and acreage of habitat that was  
12 affected, recommendations for modifying the terms and conditions to enhance the conservation of the  
13 listed species, the results of biological surveys, and information on new locations of listed species. A  
14 separate report was required if an endangered California condor was injured or killed as a result of the  
15 forest plan implementation, including circumstances of the incident and recommended modifications  
16 to enhance California condor protection.

17           C.     The 2005 Revised Forest Plans

18           53.     In September, 2005, the Forest Service completed revised forest plans for the four  
19 national forests in southern California.

20           54.     The revised forest plans are divided into three parts. Part one includes all four national  
21 forests, and consists of the “vision” and “desired conditions” for the four southern California national  
22 forests. The vision, goals and desired conditions include ecosystem health and biodiversity,  
23 community protection from wildfire, the restoration of forest health, reversing the trend of an  
24 increasing loss of natural resources due to invasive species, and quality drinking water.

25           55.     Part two is separate for each of the four national forests, and sets forth the objectives for  
26 each of the four forests, as well as defining the various “land use zones” for each national forest. Land  
27

1 uses include developed area interface, back country (motorized and non-motorized), critical biological,  
2 wilderness, and special designation overlays such as wild and scenic rivers and research natural areas.

3 56. Part three is the same for all four national forests, and sets forth the “design criteria,”  
4 including the specific standards, guidelines, and other laws, policy and direction that are intended to  
5 move the forests toward the desired conditions. The “standards” included in part 3 of the revised  
6 forest plans set forth the fundamental requirements that define the parameters for future, site-specific  
7 activities that the Forest Service anticipates will occur. Specific standards are included to meet the  
8 requirements of the NFMA regulations, and for fish and wildlife species, recreation, fire management,  
9 special use activities, soil, water and riparian areas, and livestock grazing.

10 III. The 2005 Biological Opinions on the Revised Forest Plans

11 A. The 2005 FWS Biological Opinion

12 57. On September 15, 2005, FWS submitted to the Forest Service its “Biological and  
13 Conference Opinions on the Revised Land and Resource Management Plans for the Four Southern  
14 California National Forests, California,” (“2005 FWS Biological Opinion”).

15 58. The 2005 FWS Biological Opinion addresses the potential effects of the revised forest  
16 plans for the Angeles, Cleveland, Los Padres, and San Bernardino National Forests on 40 federally  
17 listed species, and on the designated critical habitat for 19 species.

18 59. For five additional listed species, the 2005 FWS Biological Opinion concurred with the  
19 Forest Service’s “may affect, but is not likely to adversely affect determination;” and for additional  
20 listed species, the FWS concurred with the Forest Service’s “no effect” determination.

21 60. The 2005 FWS Biological Opinion identified Forest Service programs for the four  
22 national forests in southern California that are not likely to adversely affect, or will result in long-term  
23 beneficial effects, to federally listed species, including land ownership adjustments, wildlife and fish  
24 habitat management, forest management, and pest and non-native species control.

25 61. The 2005 FWS Biological Opinion identified Forest Service programs for the four  
26 national forests in southern California that are “likely to adversely affect” federally listed species,  
27 including roads and trails management, recreation management, special use permit administration,  
28

1 administrative infrastructure, fire and fuels management, livestock grazing and range management,  
2 and minerals management.

3 62. For roads and trails management, general road use and maintenance can directly and  
4 indirectly affect both listed plant and animal species in a number of ways, including the loss of plants  
5 that are immediately adjacent to roads when heavy equipment is used to clear debris off roadways, the  
6 crushing or striking of individual animals that are on roads, and the sedimentation of streams.

7 63. For recreation management, developed recreation sites result in adverse effects to listed  
8 species, which can include the trampling of animals or plants adjacent to sites, invasion of non-native  
9 species, and changes in hydrological patterns, soil compaction, and vegetation clearing caused by off-  
10 road driving and parking.

11 64. For special use permit administration, the types of special uses that may affect listed  
12 species include surface and groundwater extraction, streamflow regulation and diversion, collection of  
13 non-locatable minerals, power lines and utility corridors, communication towers, recreation residence  
14 tracts, and organizational camps.

15 65. For administrative infrastructure, the adverse affects to listed species by the use and  
16 maintenance of administrative facilities can include the trampling of individuals, compaction of soils,  
17 increased sedimentation of streams, pollution of water due to runoff from paved surfaces, and  
18 disturbance from noise and lights.

19 66. For fire and fuels management, fire fighting tactics can adversely affect listed species,  
20 including the construction and maintenance of fire lines, the use of chemical fire retardant, and the  
21 construction of fire camps, staging areas, parking sites, safety zones, and helipads.

22 67. For livestock grazing and range management, grazing can result in the trampling or  
23 consumption of listed plant species, and can adversely affect listed plant and animals species through  
24 accelerated erosion, sedimentation and additional impacts to streams, and degradation of habitat.

25 68. For minerals management, in addition to adverse impacts to plants, “[a]ll forms of  
26 mining activity from simple prospecting with pan and shovel to use of sluice boxes and suction  
27 dredges may adversely affect aquatic species.”

1  
2           69.     The 2005 FWS Biological Opinion includes a three-paragraph “incidental take  
3 statement,” which concludes as follows:

4           The Service is unable to definitely anticipate the amount, extent, location or timing of  
5 incidental take that may occur as a result of implementing these Plans. The Plans provide  
6 descriptive management direction and are prescriptive in terms of “sideboards” that would  
7 guide and limit project design and impacts to federally-listed, proposed, and candidate species.  
8 However, they do not specify what management actions would be carried out, nor when or  
9 where actions will occur. Therefore, we are not providing exemption for that take as provided  
for in section 7(o)(2) of the Act. The Service will provide 7(o)(2) exemptions, as needed and  
appropriate, when site-specific or programmatic actions are proposed and brought forward for  
consultation.

10           70.     The 2005 FWS Biological Opinion does not specify the anticipated amount or extent of  
11 incidental takings of listed species, does not set forth “take thresholds” for any listed species which if  
12 exceeded would trigger the immediate need to reinitiate consultation and cease the activity causing  
13 take, does not set forth any “reasonable and prudent measures,” does not include mandatory “terms  
14 and conditions” to implement the reasonable and prudent measures, and does not require the Forest  
15 Service to report the progress of the proposed action and its impacts on listed species.

16           B.     The 2005 NMFS Biological Opinion

17           71.     On September 16, 2005, NFMS submitted to the Forest Service its Biological Opinion  
18 on the revised forest plans for the Los Padres and Cleveland National Forests (“2005 NMFS  
19 Biological Opinion”).

20           72.     The 2005 NMFS Biological Opinion addressed the effects of the revised forest plans on  
21 steelhead and Steller sea lions. The 2005 NMFS Biological Opinion concurred with the Forest  
22 Service’s determination that the revised forest plans “may affect, but are not likely to adversely affect”  
23 Steller sea lions.

24           73.     Steelhead are an ocean-going form of rainbow trout, and are native to Pacific coast  
25 streams from Alaska to northern Mexico. Wild steelhead populations in California have declined  
26 significantly from their historic levels. This decline prompted the listing of the South-Central  
27 California Coast Evolutionary Significant Unit (ESU) of steelhead as threatened, and the Southern  
28

1 California ESU of steelhead as endangered, in August, 1997, and the listing of critical habitat for  
2 steelhead in February, 2000. There may be as few as 500 adult steelhead remaining in each of these  
3 ESUs.

4 74. Federally designated steelhead and its critical habitat are currently present within the  
5 Los Padres and Cleveland National Forests, but not the Angeles and San Bernardino National Forests.  
6 The endangered Southern California ESU of steelhead is present on both the Los Padres and Cleveland  
7 National Forests, and the threatened South-Central California Coast ESU of steelhead is also present  
8 on the Los Padres National Forest.

9 75. The 2005 NMFS Biological Opinion addresses the potential effects of (1) the  
10 implementation of the revised forest plans for the Los Padres and Cleveland National Forests, and (2)  
11 the “program categories” under the revised forest plans (including vegetation management, recreation,  
12 trail maintenance, livestock grazing, fire management practices, road maintenance, motorized trail  
13 uses, non recreational special uses, and mineral and energy uses) on steelhead and designated critical  
14 habitat for steelhead.

15 76. The 2005 NMFS Biological Opinion does not consider fire fighting tactics, such as the  
16 use of chemical fire retardant and the construction of fire lines, because of the unpredictable nature of  
17 wildfires.

18 77. For both dispersed and developed recreation, including the use of campgrounds, hiking,  
19 mountain bike riding, horseback riding, and back country camping, the NMFS Biological Opinion  
20 states that it will “limit” impacts to steelhead by applying best management practices and other  
21 mitigation measures.

22 78. Similarly, for roads and motorized trails (including off-road vehicle use), non-  
23 recreational special uses (including permits for water developments and diversions, transmission lines,  
24 and recreational residences), mineral and energy exploration and development, and livestock grazing,  
25 the 2005 NMFS Biological Opinion states that it will “limit” impacts to steelhead by applying best  
26 management practices and other mitigation measures.

1           79.     Steelhead within the boundaries of the Los Padres and Cleveland National Forests have  
2 been impacted by past and current uses and by activities that have occurred and continue to occur on  
3 national forest lands. Factors affecting steelhead and critical habitat in the action area include dams,  
4 water diversions, land-use practices (including grazing and forestry), construction and use of roads,  
5 and wildfires.

6           80.     According to the 2005 NMFS Biological Opinion, although the revised forest plans for  
7 the Los Padres and Cleveland National Forests improve management through the designation of land  
8 use zones and organized standards, the effectiveness of the revised forest plans for attaining the  
9 intended benefits for steelhead and its critical habitat remains a concern. The revised forest plans  
10 provide general guidance, land use zoning, and standards that lack specific details that may be  
11 necessary to ensure consistency, to measure and monitor performance, and to minimize adverse effects  
12 to steelhead and critical habitat. These deficiencies may cause harm, injury, or mortality of steelhead  
13 and degrade its critical habitat.

14           81.     According to the 2005 NMFS Biological Opinion, projects within the “program  
15 categories” are expected to have adverse effects on steelhead and critical habitat.

16           82.     The location of recreational facilities and related activities cause concentrated human  
17 use in areas of the national forests where steelhead and critical habitat are present, and the potential  
18 that steelhead and critical habitat could be adversely affected by recreation would be increased under  
19 the revised forest plans. Recreational activities and uses may alter the quantity and quality of instream  
20 and riparian habitat, increase erosion and sedimentation, and disturb young steelhead. Additional  
21 adverse effects can occur through fishing, wading, and swimming, and can involve mortality, injury,  
22 and harm of steelhead. The effects are expected to range from negligible to severe depending in part  
23 on the type of impact, area affected, and number of steelhead present.

24           83.     Erosion and sedimentation from trails, and dry and wet season runoff from  
25 campgrounds are expected to cause impacts to steelhead and/or critical habitat essentially year round.

1           84.     For “roads and motorized trails,” roads, culverts, and stream crossings are likely to  
2 adversely affect steelhead and critical habitat. The underlying cause of the adverse impacts include  
3 fine sediment and roads through streams.

4           85.     Roads and the use of roads and motorized trails may cause alteration of riparian and  
5 instream habitat, alteration of passage conditions, and increase sedimentation and turbidity. The  
6 degradation of habitat conditions through loss or alteration of riparian and instream habitat and water  
7 quality may have adverse consequences for steelhead. Roads can impede passage of salmonids, and  
8 the sediment generated by roads can negatively affect the quality and quantity of spawning and rearing  
9 habitat, thus decreasing the survival of young fish and their food.

10          86.     Road maintenance activities and the uses that occur on these roads and motorized trails  
11 may increase turbidity and sedimentation.

12          87.     Roads on the Los Padres and Cleveland National Forests have the potential to affect  
13 756 acres of occupied steelhead trout habitat and 5,257 acres of critical habitat. Motorized trail  
14 activities and use could potentially affect 543 acres of occupied and 3,355 acres of critical habitat.

15          88.     Water developments and right of ways on the Los Padres and Cleveland National  
16 Forests are expected to generate impacts that may prove harmful for steelhead and/or their habitat.  
17 Water developments, including dams and diversions, may affect water quality. Eliminating, reducing,  
18 or altering the quality and quantity of surface discharge and instream habitat could harm or kill rearing  
19 steelhead.

20          89.     Right of ways associated with roads and transmission lines may contribute sediment to  
21 streams both over the short- and long-term, and may result in losses of riparian habitat.

22          90.     Minerals and energy uses have the potential to affect 725 acres of occupied steelhead  
23 habitat and 5,091 acres of critical habitat.

24          91.     Livestock grazing can eliminate and/or alter riparian vegetation and instream habitat,  
25 and increase sedimentation, turbidity, and nutrients in streams. Livestock grazing could potentially  
26 affect 2,793 acres of occupied steelhead habitat and 21,031 acres of critical habitat.

1 92. The 2005 NMFS Biological Opinion determined that certain activities within the Los  
2 Padres and Cleveland National Forests are expected to continue to diminish the quantity and quality of  
3 the action area as sites of freshwater migration and fresh water rearing. The effects may involve  
4 altering instream and riparian habitat, impeding fish passage conditions, increasing sedimentation and  
5 turbidity, reducing the quantity and quality of spawning and rearing areas, and harming, harassing,  
6 injuring and killing steelhead.

7 93. The 2005 NMFS Biological Opinion concluded that the revised forest plans for the Los  
8 Padres and Cleveland National Forests are “not likely to jeopardize” the continued existence of the  
9 federally listed steelhead, and are “not likely to destroy or adversely modify” the designated critical  
10 habitat for steelhead.

11 94. The 2005 NMFS Biological Opinion includes a one paragraph Incidental Take  
12 Statement, which states as follows:

13 Due to the programmatic nature of this Biological Opinion, the specific information necessary  
14 to determine the amount and extent of incidental take is not presently available. Therefore,  
15 incidental take of steelhead is not exempted by this programmatic Biological Opinion. The  
16 Forest will initiate individual section 7 consultation with NMFS for future proposed actions  
17 that may affect steelhead, and at such time the amount and extent of incidental take will be  
18 identified.

19 95. The 2005 NMFS Biological Opinion does not specify the anticipated amount or extent  
20 of incidental takings of listed species, does not set forth “take thresholds” for any listed species which  
21 if exceeded would trigger the immediate need to reinitiate consultation and cease the activity causing  
22 take, does not set forth any “reasonable and prudent measures,” does not include mandatory “terms  
23 and conditions” to implement the reasonable and prudent measures, and does not require the Forest  
24 Service to report the progress of the proposed action and its impacts on listed species.

### 25 **FIRST CLAIM FOR RELIEF**

26 The 2005 FWS Biological Opinion Fails to Comply with the ESA, and Is Arbitrary,  
27 Capricious, and Not in Accordance with Law under the APA

28 96. Plaintiffs hereby incorporate by reference all preceding paragraphs.

1           97.     On September 15, 2005, FWS completed and transmitted to the Forest Service its  
2 Biological Opinion on the revised forest plans for the Angeles, Cleveland, Los Padres, and San  
3 Bernardino National Forests and their effects on 40 federally listed species and designated critical  
4 habitat. For each of these 40 federally listed species, FWS concluded that implementation of the  
5 revised forest plans is not likely to jeopardize the continued existence of the species. FWS also  
6 concluded that implementation of the revised forest plans is not likely to result in the destruction or  
7 adverse modification of any designated critical habitat.

8           98.     The Incidental Take Statement accompanying the 2005 FWS Biological Opinion fails  
9 to meet the mandatory requirements under the ESA. The Incidental Take Statement fails to specify the  
10 amount or extent of incidental take on the listed species; fails to set forth any alternative “take  
11 threshold” or surrogate which, if reached or exceeded, would trigger the need to reinitiate consultation;  
12 fails to specify the reasonable and prudent measures that FWS considers necessary or appropriate to  
13 minimize the impact of such take; and fails to set forth the terms and conditions (including, but not  
14 limited to, reporting requirements) that must be complied with by the Forest Service to implement the  
15 reasonable and prudent measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The Incidental Take  
16 Statement fails to require the Forest Service to monitor and report the impacts and extent of incidental  
17 take on listed species, and fails to provide any method to determine whether the amount or extent of  
18 incidental take is exceeded in order to trigger the mandatory requirement to reinitiate consultation. 50  
19 C.F.R. § 402.14(i)(3-4).

20           99.     Because the 2005 FWS Biological Opinion fails to specify, predict, or determine the  
21 amount or extent of incidental take expected to be caused by the implementation of the revised forest  
22 plans, FWS lacked any rational basis to conclude that the revised forest plans are not likely to  
23 jeopardize any of the threatened and endangered species on the Angeles, Cleveland, Los Padres, and  
24 San Bernardino National Forest. 16 U.S.C. § 1536(a)(2).

25           100.    FWS’ failure to provide an Incidental Take Statement with the 2005 FWS Biological  
26 Opinion regarding the revised forest plans for the four southern California national forests that meets  
27 the mandatory requirements of the ESA is arbitrary, capricious, an abuse of discretion, and not in  
28

1 accordance with the law. 5 U.S.C. § 706(2)(A). Moreover, because FWS failed to specify, determine,  
2 or predict the amount or extent of incidental take for each of the listed species, its conclusion that the  
3 revised forest plans are not likely to jeopardize the continued existence of any of the listed species is  
4 arbitrary, capricious, an abuse of discretion, and not in accordance with law. *Id.* The 2005 FWS  
5 Biological Opinion should be held unlawful and set aside. 5 U.S.C. § 706(2).

6 **SECOND CLAIM FOR RELIEF**

7 The 2005 NMFS Biological Opinion Fails to Comply with the ESA, and Is Arbitrary,  
8 Capricious, and Not in Accordance with Law under the APA

9 101. Plaintiffs hereby incorporate by reference all preceding paragraphs.

10 102. On September 16, 2005, NMFS completed and transmitted to the Forest Service its  
11 Biological Opinion on the revised forest plans for the Los Padres and Cleveland National Forests and  
12 their effects on steelhead and designated critical habitat. NMFS concluded that implementation of the  
13 revised forest plans is not likely to jeopardize the continued existence of the South-Central California  
14 Coast or Southern California Evolutionary Significant Units of steelhead, and is not likely to destroy  
15 or adversely modify their critical habitat.

16 103. The Incidental Take Statement accompanying the 2005 NMFS Biological Opinion fails  
17 to meet the mandatory requirements under the ESA. The Incidental Take Statement fails to specify the  
18 amount or extent of incidental take; fails to set forth any alternative “take threshold” or surrogate  
19 which, if reached or exceeded, would trigger the need to reinitiate consultation; fails to specify the  
20 reasonable and prudent measures that FWS considers necessary or appropriate to minimize the impact  
21 of such take; and fails to set forth the terms and conditions (including, but not limited to, reporting  
22 requirements) that must be complied with by the Forest Service to implement the reasonable and  
23 prudent measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The Incidental Take Statement fails  
24 to require the Forest Service to monitor and report the impacts and extent of incidental take, and fails  
25 to provide any method to determine whether the amount or extent of incidental take is exceeded in  
26 order to trigger the mandatory requirement to reinitiate consultation. 50 C.F.R. § 402.14(i)(3-4).



1 revised forest plans is not likely to jeopardize the continued existence of any listed species or result in  
2 the destruction or adverse modification of their critical habitat, in violation of 16 U.S.C. § 1536(a)(2).

3 109. In addition, the Forest Service's reliance on the invalid biological opinions issued by  
4 FWS and NMFS for the revised forest plans violates Section 7 of the ESA, 16 U.S.C. § 1536(a)(2).

5 110. Because consultation on the revised forest plans has not yet been completed, the Forest  
6 Service is also in violation of Section 7(d) of the ESA for making irreversible and irretrievable  
7 commitments of resources through the ongoing implementation of the revised forest plans for the  
8 Angeles, Cleveland, Los Padres, and San Bernardino National Forest. 16 U.S.C. § 1536(d).

9 **RELIEF REQUESTED**

10 WHEREFORE, Plaintiffs respectfully request that this Court:

11 A. Declare that FWS' 2005 Biological Opinion regarding the implementation of the  
12 revised forest plans for the Angeles, Cleveland, Los Padres, and San Bernardino National Forests is in  
13 violation of the ESA, and is arbitrary, capricious, an abuse of discretion, and contrary to the law  
14 pursuant to the APA;

15 B. Declare that NMFS' 2005 Biological Opinion regarding the implementation of the  
16 revised forest plans for the Cleveland and Los Padres National Forests is in violation of the ESA, and  
17 is arbitrary, capricious, an abuse of discretion, and contrary to the law pursuant to the APA;

18 C. Declare that the Forest Service has violated Section 7 of the ESA by failing to insure  
19 that implementation of the revised forest plans for the national forests in southern California is not  
20 likely to jeopardize listed species or adversely modify their habitat, by failing to complete consultation  
21 on the revised forest plans with FWS and NMFS, and by relying on invalid biological opinions for the  
22 revised forest plans;

23 D. Order FWS to prepare a legally adequate biological opinion and incidental take  
24 statement regarding the implementation of the revised forest plans for the Angeles, Cleveland, Los  
25 Padres, and San Bernardino National Forests;

1 E. Order NMFS to prepare a legally adequate biological opinion and incidental take  
2 statement regarding the implementation of the revised forest plans for the Cleveland and Los Padres  
3 National Forests;

4 F. Order appropriate injunctive relief to sufficiently protect the federally designated  
5 threatened and endangered species, and Plaintiffs' interests, pending the federal agencies' compliance  
6 with the ESA;

7 G. Allow Plaintiffs to recover costs, expenses, expert witness fees, and reasonable attorney  
8 fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, and the ESA, 16 U.S.C. § 1540(g)(4);  
9 and

10 H. Grant Plaintiffs such further relief as may seem to this Court to be just, proper, and  
11 equitable.

12 Dated this 5th day of March, 2008.

13  
14 Respectfully submitted,

15 Marc D. Fink, *application for pro hac vice pending*  
16 Justin Augustine  
17 Attorneys for Plaintiffs

18 By: 

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