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25 UNITED STATES DISTRICT COURT  
26 NORTHERN DISTRICT OF CALIFORNIA  
27 SAN FRANCISCO DIVISION

28 KARUK TRIBE, ENVIRONMENTAL ) Civ. No.  
PROTECTION INFORMATION CENTER, )  
29 KLAMATH RIVERKEEPER, KLAMATH ) **COMPLAINT**  
30 SISKIYOU WILDLANDS CENTER, )  
31 CENTER FOR BIOLOGICAL DIVERSITY, )  
32 )  
33 Plaintiffs, )  
34 )  
35 v. )  
36 )  
37 WILLIAM STELLE, NATIONAL MARINE )

1 FISHERIES SERVICE, )  
2 Defendants. )  
3 \_\_\_\_\_ )

4 **INTRODUCTION**

5 1. This is a civil action against the National Marine Fisheries Service (“NMFS”) of the U.S.  
6 Department of Commerce. Plaintiffs allege NMFS violated the Endangered Species Act (“ESA”)  
7 when it issued a Biological Opinion (“BiOp”) and Incidental Take Statement (“ITS”) for the  
8 Westside Fire Recovery Project (“Westside Project”) on Forest Service lands in the Klamath  
9 River watershed.

10 2. The Karuk Tribe has occupied lands along the Klamath River since time immemorial.  
11 The Klamath, Salmon, and Scott rivers are within Karuk ancestral territory, and are the lifeblood  
12 of the Karuk people. Before Europeans entered these lands, these waters provided the Karuk  
13 Tribe with a bountiful supply of anadromous fish, including coho and chinook salmon and  
14 steelhead trout. Today, in the Klamath River watershed, coho salmon are listed as threatened  
15 with extinction under the ESA.

16 3. In 2014, natural wildfires burned approximately 162,580 acres in the Klamath River  
17 watershed with mixed-severity effects to soil and vegetation. Subsequently, the U.S. Forest  
18 Service proposed the Westside Project, to be implemented across 218,000 acres that include  
19 eleven major rivers and streams in the watershed. The Westside Project includes 5,760 acres of  
20 post-fire clear-cut logging of live and dead trees in some of the most steep and wild mountains  
21 on the West Coast. Nearly 2,000 acres of this “salvage” sale include “units” to be logged that  
22 include geologically unstable landslide terrain. The Westside Project also proposes to clear and  
23 construct over 100 landing sites, cleared areas in the forest where cut trees are yarded or skidded  
24 for loading onto log trucks. The Westside Project would yield approximately 75 million board  
25 feet of merchantable timber that will require over 15,000 log trucks to remove.

26 4. Because the Westside Project will adversely affect coho salmon and its critical habitat,  
27 the Forest Service consulted with NMFS under Section 7 of the ESA regarding effects of the  
28 project. On January 15, 2016, NMFS issued a BiOp that found the Westside Project will not  
jeopardize the continued existence of coho salmon or adversely modify its critical habitat. NMFS

1 also issued an ITS to establish a permissible level of “take” of coho salmon projected to result  
2 from the project. The BiOp and ITS are unlawful under the ESA.

### 3 **JURISDICTION**

4 5. This Court has jurisdiction pursuant to 28 U.S.C. § 1331. The BiOp and ITS comprise  
5 final agency action subject to judicial review under the Administrative Procedure Act (“APA”).  
6 This Court may issue declaratory relief pursuant to 28 U.S.C. § 2202. This Court may issue  
7 injunctive relief pursuant to 28 U.S.C. § 2201, 5 U.S.C. § 702, and 5 U.S.C. § 706. An actual,  
8 justiciable controversy exists between Plaintiffs and Defendants.

### 9 **INTRADISTRICT ASSIGNMENT**

10 6. Venue in this court is proper under 28 U.S.C § 1391(1)(b). Plaintiffs Karuk Tribe,  
11 Environmental Information Protection Center, Klamath Riverkeeper, and Center for Biological  
12 Diversity reside in this District. Defendants reside in this district. The Western Regional Office  
13 of NMFS, which issued the BiOp and ITS, is based in Santa Rosa, California.

### 14 **PARTIES**

15 7. Plaintiff KARUK TRIBE is a federally-recognized Indian Tribe that occupies aboriginal  
16 land along the middle course of the Klamath and Salmon Rivers in Northern California. The  
17 Karuk Tribe’s Aboriginal Territory has been previously mapped, and includes an estimated 1.38  
18 million acres within the Klamath River Basin. Nearly all of Karuk Aboriginal Territory is located  
19 within lands administered by the Klamath National Forest and the Six Rivers National Forest.  
20 Karuk Tribe trust lands are composed of individual and Tribal Trust properties scattered along  
21 the Klamath River between Yreka and Orleans, California, with Tribal centers and administrative  
22 facilities located in Happy Camp, Orleans, Somes Bar, and Yreka. The Karuk Tribe values the  
23 interests and wellbeing of the Karuk People. The values associated with this well-being are  
24 primarily health, justice, economic security, education, housing, self-governance, as well as the  
25 management and utilization of cultural/natural resources within and adjacent to the Karuk  
26 Aboriginal Territory now and forever. The Karuk Tribe also values the interests and well-being  
27 of the general public, and applicable Tribal services and management principals are extended to  
28 the general public as a secondary benefit. It is a belief of the Karuk Tribe that the values stated

1 above must be managed in a manner consistent with Karuk tradition, custom, culture and  
2 ceremonial principles in order to ensure cultural perseverance.

3 8. The Karuk Tribe has a unique vested interest in these lands because of their location and  
4 relation to their aboriginal homelands. The families from the villages in the Karuk Aboriginal  
5 Territory, as well as other Tribal members, have occupied and utilized the cultural/natural  
6 resources throughout the territory since time immemorial. Tribal People continue to maintain a  
7 unique relationship with the land and value many forest resources as sacred. The Karuk Tribe  
8 would be irreparably injured by the Westside Project.

9 9. Plaintiff ENVIRONMENTAL PROTECTION INFORMATION CENTER (“EPIC”) is a  
10 nonprofit public benefit corporation organized under the laws of California. Since 1977, EPIC  
11 has defended the wildlife and wild places of the Klamath Mountains and North Coast Range.  
12 EPIC’s mission is science-based protection and restoration of Northwest California’s forests and  
13 seeks to ensure that a connected landscape exists for species survival and climate adaption.  
14 EPIC’s advocacy utilizes community organizing, public education, collaboration, and litigation  
15 and submits substantive comments on projects that would negatively impact public and private  
16 forestlands. EPIC maintains an office in Arcata, California. Most of the 2,000 members and  
17 13,000 supporters live in northern California. EPIC’s members and staff use, enjoy, and recreate  
18 on public lands and Wild and Scenic Rivers, including those within the project area on the  
19 Klamath National Forest, and would be irreparably injured by the Westside Project.

20 10. Plaintiff KLAMATH RIVERKEEPER is a community-based non-profit organization  
21 based in the Klamath Basin of Northern California and Southern Oregon. Klamath Riverkeeper’s  
22 mission is to restore water quality and fisheries in the Klamath Basin, bringing vitality and  
23 abundance back to the rivers and the people who depend on them. Klamath Riverkeeper works  
24 closely with the Klamath River tribes, fishing communities, and recreational groups in all aspects  
25 of its programs. Klamath Riverkeeper has an active membership of people from all over the  
26 Klamath Basin that use the Klamath National Forest for recreation, education, fishing, aesthetic  
27 enjoyment and spiritual renewal. This use includes observing and studying the migration of  
28

1 anadromous fish. Klamath Riverkeeper is a membership organization and has members who  
2 would be irreparably injured by the Westside Project.

3 11. Plaintiff KLAMATH-SISKIYOU WILDLANDS CENTER (“KS Wild”) is a domestic  
4 non-profit corporation organized and existing under the laws of the State of Oregon. KS Wild’s  
5 main offices are in Ashland, Oregon. KS Wild has 3,500 members in over 10 states, with most  
6 members concentrated in southern Oregon and northern California. On behalf of its members,  
7 KS Wild advocates for the forests, wildlife, and waters of the Rogue and Klamath Basins and  
8 works to protect and restore the extraordinary biological diversity of the Klamath-Siskiyou  
9 region of southwest Oregon and northwest California. KS Wild uses environmental law, science,  
10 education, and collaboration to help build healthy ecosystems and sustainable communities.  
11 Through its campaign work, KS Wild strives to protect the last wild areas and vital biological  
12 diversity of the Klamath region. KS Wild is a leader in protecting California’s national forests  
13 and routinely participates in commenting, monitoring, and litigation affecting public lands in  
14 California. KS Wild is a membership organization and has members who would be irreparably  
15 injured by the Westside Project.

16 12. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”) is a California nonprofit  
17 public benefit corporation with more than 48,000 members dedicated to the preservation,  
18 protection, and restoration of biodiversity and ecosystems in northern California and throughout  
19 the world. On behalf of its members, the Center works to insure the long-term health and  
20 viability of animal and plant species and to protect the habitat those species need to survive. The  
21 Center also has a procedural interest in the proper management of these lands in full compliance  
22 with mandatory public land and environmental laws and regulations. The Center is a membership  
23 organization and has members who would be irreparably injured by the Westside Project.

24 13. Defendant WILLIAM STELLE is the Regional Administrator for the West Coast Region  
25 of NMFS. Mr. Stelle is sued in his official capacity. Mr. Stelle signed the BiOp and ITS.

26 14. Defendant NATIONAL MARINE FISHERIES SERVICE is an agency within the U.S.  
27 Department of Commerce and a subdivision of the National Oceanic and Atmospheric  
28

1 Administration. NMFS is responsible for the recovery of coho salmon under the ESA. NMFS  
2 personnel in Arcata, California developed the BiOp and ITS.

### 3 **FACTS**

4 15. Coho salmon is an anadromous fish species that generally exhibits a three-year life cycle.  
5 Adult coho typically begin their freshwater spawning migration in late summer and early fall,  
6 spawn by mid-winter, and then die. Coho salmon spawning occurs mainly in November to  
7 December. Spawning occurs in mainstem rivers, and in tributaries and creeks. Juvenile coho rear  
8 in fresh water for up to 15 months. Rearing coho juveniles require a complex stream morphology  
9 of pools, riffles, and backwaters created by large downed trees in the stream channel. Complex  
10 habitat structure helps protect juvenile coho from predators, and from high water flows that can  
11 occur during the winter. Coho smolts migrate to the ocean in the spring. Coho adults typically  
12 spend 15 months in the ocean before returning to their natal stream to spawn.

13 16. Coho salmon were historically distributed throughout the North Pacific Ocean from  
14 Central California north to Point Hope, Alaska. NMFS has identified six “evolutionary  
15 significant units” (“ESU”) of coho in the region. One ESU is Southern Oregon/Northern  
16 California Coast (“SONCC”) coho. SONCC coho is comprised of forty-one populations ranging  
17 from Punta Gorda, California, north to Cape Blanco, Oregon.

18 17. In 1997, NMFS listed SONCC coho as threatened with extinction under the ESA. NMFS  
19 found that logging is one of the major activities responsible for the decline of SONCC coho.  
20 NMFS found that logging has degraded SONCC coho habitat by removing and disturbing natural  
21 vegetation. NMFS has found that timber harvest remains a “high” or a “very high” threat to 20 of  
22 39 populations of SONCC coho.

23 18. In 1999, NMFS designated critical habitat for SONCC coho salmon. Critical habitat for  
24 SONCC coho salmon encompasses accessible reaches of all rivers (including estuaries areas and  
25 tributaries) between the Mattole River in California and the Elk River in Oregon.

26 19. In 2011, NMFS completed a status review of SONCC coho. NMFS found that SONCC  
27 coho are trending in declining abundance.

1 20. Sediment generated by logging, road building and use, landing construction, and  
2 associated activities can harm SONCC coho salmon and their habitat. Sediment can harm fish by  
3 smothering eggs and preventing emergence. Sediment can reduce inter-gravel oxygen and harm  
4 salmon survival. Sediment can increase turbidity in the water column. Turbidity in the water  
5 column can interfere with sight-feeding by coho salmon. Turbidity in the water column and  
6 deposition can bury macroinvertebrate insects and their habitat. Turbidity and deposition in the  
7 water can aggrade streambeds.

8 21. In July, 2014, natural wildfires occurred on 183,500 acres of lands in the Klamath River  
9 basin. These wildfires occurred on 162,580 acres of public lands on the Klamath National Forest,  
10 and on 20,910 acres of private lands. The Beaver Fire ignited on July 20, 2014, occurred on the  
11 north side of the Klamath River about 30 miles east of Happy Camp, and burned approximately  
12 32,400 acres. The Whites Fire Complex was comprised of the Log and Whites Fires, ignited on  
13 July 31, 2014, and burned approximately 37,000 acres within the Scott and North Fork Salmon  
14 River watersheds. The Happy Camp Complex ignited on August 12, 2014, occurred, and burned  
15 approximately 117,000 acres. These fires collectively are known as the Westside Fire Complex.

16 22. The Westside Fire Complex area is located in the middle portion of the Klamath River  
17 basin. The middle portion of the Klamath River basin extends from Iron Gate Dam (river mile  
18 190) downstream to the confluence with the Trinity River (river mile 43.5). The fires burned  
19 with mixed severity. This means that within the Westside Fire Complex, there was a mosaic of  
20 none, light, moderate, and severely burned areas within each fire. Within the complex as a  
21 whole, twenty-two to thirty percent (22-30%) of the burned areas were rated as medium in  
22 severity. Within the complex, one to six percent (1-6%) of the burned areas were rated as high in  
23 severity. Sixty-four percent (64%) of the burned areas were neither medium nor high in severity.

24 23. Before the Happy Camp Complex was contained, the Forest Service initiated scoping for  
25 the Westside Project.

26 24. On March 13, 2015, the Forest Service issued a draft environmental impact statement  
27 (“DEIS”) to assess the environmental consequences of the Westside Project. Plaintiffs Karuk  
28 Tribe, Klamath Riverkeeper, EPIC, KS Wild, and the Center submitted comments on the DEIS.

1 In July, 2015, the Forest Service released a final environmental impact statement (“EIS”) for the  
2 Westside Project.

3 25. The Westside Project includes a project area encompassing 218,000 acres: 187,100 acres  
4 of National Forest System land and 31,500 acres of private land; the logging challenged in this  
5 action will take place on National Forest System lands. The Westside Project area is divided into  
6 three subparts: project area A (Beaver Fire), project area B (Happy Camp), and project area C  
7 (Whites Fire). The Westside Project area is within Karuk Aboriginal Territory.

8 26. The Westside Project authorizes commercial salvage harvest and reforestation on 5,760  
9 acres. Standing dead trees at least fourteen inches in diameter at breast height (“dbh”) will be  
10 selected for logging. Acres to be logged are within eleven fifth field watersheds. Commercial  
11 salvage harvest is expected to be completed over a two-year period.

12 27. The Westside Project authorizes logging on approximately 3,700 acres along about 320  
13 miles of roadways. This includes an estimated 1,200 acres of concentrated hazard tree removal in  
14 higher severity burn areas. This also includes an estimated 2,500 acres of scattered hazard tree  
15 removal in lower severity burn areas. Hazard tree removal includes operations along 11.2 miles  
16 roads used by the public and for administrative use under separate authority. This logging is  
17 intended to protect public health and safety.

18 28. To facilitate logging, the Westside Project authorizes construction and use of  
19 approximately 6.2 miles of temporary roads.

20 29. To facilitate logging, the Westside Project authorizes use of 40 existing landings for  
21 staging of log yarding and hauling operations. In addition, 75 new landings will be constructed.  
22 The landings will be used for individual helicopter landings, individual skyline landings, and  
23 ground-based landings. The individual helicopter landings will be up to two acres in size. The  
24 individual skyline and ground-based landings will be up to one and one-half acres in size.

25 30. The Westside Project authorizes “fuel reduction treatments” on approximately 24,450  
26 acres. These are acres where the 2014 wildfires caused moderate and high vegetation mortality.  
27 “Fuel reduction treatments” will occur in approximately 3,594 acres of riparian reserves. Trees  
28 up to 16-inches in diameter will be cut and felled in riparian reserves. Ground-based equipment



1 will not be used to implement fuel reduction treatments in riparian reserves. Fuel treatments will  
2 occur within ten years after salvage harvest and hazard tree removal have been completed.

3 31. The Westside Project authorizes site preparation, reforestation, and release on  
4 approximately 12,700 acres. Site preparation means the reduction of fuels in areas that have  
5 previously been logged, and where fuel loads exceed seven tons per acre or in previous  
6 plantations identified as unable to naturally recover. Reforestation means the planting of conifer  
7 species to aid in the artificial reforestation of an area. Reforestation may be necessary to establish  
8 forests in areas that have been salvage logged, as logging inhibits the natural regeneration of  
9 forests. Release means actions taken to reduce competition for conifers, such as cutting back  
10 competing brush, to encourage faster tree growth. Cumulatively, these actions are intended to  
11 increase the likelihood and speed by which burned forested areas are reforested.

12 32. The Westside Project authorizes “legacy sediment site treatments” at approximately 158  
13 locations. These treatments are intended to reduce sediment mobilization and delivery into  
14 streams. These treatments will occur along Forest Service roads and at stream crossings. Some  
15 legacy sites are located on existing landings or on roadbeds. Legacy treatments include culvert  
16 upgrades at 45 sites. Legacy treatments include “diversion prevention” at 51 sites. Legacy  
17 treatments include “aquatic organism passage improvement” at three sites. Legacy treatments  
18 include “retaining wall construction” at seven sites. Legacy treatments include “fill reduction” at  
19 16 sites. Legacy treatments include “fill removal” at 27 sites. Legacy treatments include  
20 “culvert/ditch infrastructure repair or maintenance” at 16 sites.

21 33. Legacy site treatment is limited to the Elk Creek watershed. The majority of project work  
22 likely to contribute sediment pollution will occur in the Grider Creek and Walker Creek  
23 watersheds.

24 34. Treatment of legacy sites for the Westside Project is expected to begin in 2019.  
25 Treatment of legacy sites may take up to 20 years or longer to complete. Treatment of legacy  
26 sites depends on funding. Funding for treatment of legacy sites is currently uncertain and  
27 speculative. Legacy treatment sites are outside of and at least 300 feet upstream from SONCC  
28

1 coho salmon critical habitat. No legacy sites are located in any occupied SONCC coho salmon  
2 habitat.

3 35. Prescribed burning may continue for several years following completion of other  
4 vegetation treatment activities.

### 5 **The Westside Project BiOp and Incidental Take Statement**

6 36. The majority of the watersheds in the Westside Project area have steep soil-covered  
7 hillslopes that are at or near “sediment mobilization thresholds,” meaning they are highly prone  
8 to landslides. Habitat for SONCC coho in the Westside Project area has been affected by  
9 sediment erosion and passage barriers in the project area. The Westside Fire Complex made the  
10 landscape more vulnerable to surface erosion and soil movement, due to the loss of ground  
11 cover, reduced soil cohesion from the loss of rooted plants, and increased water yield.

12 37. In July and early August, 2015, thunderstorms occurred in several watersheds within the  
13 Westside Project area, in many cases overlapping with steep slopes and areas burned in 2014.  
14 The thunderstorms triggered sediment-laden debris flows into SONCC coho critical habitat,  
15 including in the North Fork Salmon River, South Russian Creek, Whites Gulch, Beaver Creek,  
16 Walker Creek, Grider Creek, Elk Creek, lower Scott River, and the mainstem Klamath River.  
17 The debris flows resulted in complete infilling of pools, leaving thick lenses of sediment on top  
18 of former streambeds. These debris flow events elevated turbidity. The elevated turbidity will  
19 persist as streams continue to incise through streambed sediment lenses. This winnowing process  
20 could take years.

21 38. The Westside Project will occur in the Beaver Creek, Elk Creek, Horse Creek-Klamath  
22 River, Humbug Creek-Klamath River, Indian Creek, Lower Scott River, North Fork Salmon  
23 River, Seiad Creek-Klamath River, South Fork Salmon River, Thompson Creek-Klamath River  
24 and Ukonom Creek-Klamath River watersheds. All of these watersheds provide habitat for  
25 SONCC coho.

26 39. The Westside Project will impact five coho populations within the SONCC coho ESU.  
27 The Upper Klamath River coho salmon population has a high extinction risk. Numbers of Upper  
28 Klamath River coho salmon population are likely below the depensation threshold. The Middle

1 Klamath River coho salmon population has a moderate extinction risk. The population of Middle  
2 Klamath River coho salmon is likely above the depensation threshold. The Salmon River coho  
3 salmon population has a high extinction risk. The population of Salmon River coho salmon is  
4 likely above the depensation threshold. The Scott River coho salmon population has a moderate  
5 extinction risk. The population of Salmon River coho is likely above the depensation threshold.  
6 The Shasta River coho population has a high extinction risk. The Shasta River coho salmon  
7 population is likely below the depensation threshold.

8 40. On January 16, 2016, NMFS issued the BiOp and ITS for the Westside Project. NMFS  
9 found the Westside Project will cause hydrologic alterations, increased sediment erosion and  
10 transport to streams, and altered ecological recovery in affected watersheds. NMFS found the  
11 Westside Project will result in effects to hydrology caused by ground disturbances from timber  
12 salvage harvest and yarding, construction of landings and temporary roads, and log hauling on  
13 roads. NMFS found the Westside Project will cause an increase in sedimentation in all but one of  
14 the watersheds affected by the project. NMFS found the Westside Project will cause an increase  
15 in erosion, landslide risk, and water temperatures. NMFS found the Westside Project will cause a  
16 decrease in watershed recovery, habitat availability, availability of large woody debris, and water  
17 quality.

18 41. NMFS found that effects to SONCC coho salmon critical habitat may result from other  
19 activities authorized under the Westside Project, including (1) decreased habitat availability at  
20 the site level at and immediately downstream from water drafting sites, coincident with drafting  
21 activities; (2) increased water temperatures due to loss of stream shading at the site level from  
22 hazard tree felling and brushing out of drafting access points, as well as increased water  
23 temperatures downstream from tributary water drafting sites during active pumping; (3)  
24 decreased water quality from chemical spills associated with the operation of mechanized  
25 equipment near stream channels; and (4) decreased large woody debris recruitment/availability  
26 associated with hazard tree removal.

27 42. NMFS found that salvage harvest will result in adverse effects to individual SONCC  
28 coho salmon for approximately ten years.

1 43. Landslides are evaluated in the BiOp as they may affect SONCC coho by modifying its  
2 habitat. The fires of 2014 increased the landslide risk in the Westside Project area through a loss  
3 of root strength caused by tree mortality. Root strength decreases over time after tree death.  
4 NMFS’s analysis of the baseline condition, including the loss of root strength and increased risk  
5 of land-sliding post-fire, assumed 100% tree mortality and resulting loss of root strength. In areas  
6 that burned at high-severity and subsequently are proposed for logging, many but not all of the  
7 trees are dead. Some trees may be injured and will survive; others are injured and are projected  
8 to die in the near future. Until a tree dies, it provides root strength and support. NMFS failed to  
9 include root strength from surviving trees when it evaluated baseline conditions.

10 44. NMFS found forest management involving timber harvest, fire suppression, and road  
11 system use can exacerbate climate and fire regime effects on landslide risk. NMFS found the  
12 Westside Project will increase the landslide or “mass wasting” risk above the post-fire baseline.  
13 In evaluating the landslide risk, NMFS analyzed the risk separately from the Equivalent Roaded  
14 Area (ERA) model as the ERA model is not appropriate in evaluating landslide risk. NMFS  
15 identified multiple project activities which may contribute to landslide risk, including reopening  
16 of decommissioned roads, use of temporary roads on existing roadbeds, construction of new  
17 temporary roads, and the construction of new landings.

18 45. The Grider Creek and Walker Creek areas are susceptible to landslides. The Grider Creek  
19 and Walker Creek areas are underlain by highly weathered and dissected granitic lands. These  
20 watersheds are susceptible to shallow landsliding, such as debris slides and debris flows.

21 46. NMFS found the duration of elevated landslide risk is influenced by the time to establish  
22 new vegetative growth and associated root strength. Root strength may vary by species, age, and  
23 density. Many “pioneer” species—that is, species that are the first to re-establish post high-  
24 severity fire—provide root strength and help to stabilize soils. Natural regeneration is occurring  
25 in the Westside Project action area, including in areas that burned at moderate- to high-severity.

26 47. NMFS found that post-fire logging may slow natural forest regeneration through injuring  
27 or removing naturally regenerated seedlings or root collar sprouts, compacting soils, reducing  
28

1 organic matter and soil moisture, increasing temperature from loss of shading, and other  
2 processes.

3 48. NMFS admits natural regeneration may be slowed in the Westside Project due to logging.  
4 NMFS found that project activities such as site preparation, planting, release, and legacy  
5 sediment site treatment, are all expected to reduce the long term duration of this elevated  
6 landslide risk from approximately 80 years down to 30–40 years. In particular, site preparation,  
7 planting, and release would help reestablish trees and associated root strength. These mitigating  
8 project features will only occur after post-fire logging has occurred. NMFS’s analysis assumed  
9 full project implementation.

10 49. Receipts from the sale of timber will be insufficient to pay for site preparation,  
11 replanting, and release as proposed. The Forest Service will need to seek money from alternative  
12 sources, including congressional appropriations, to pay for these project features. Additional  
13 revenue is uncertain and speculative. NMFS did not analyze the impact to the duration of  
14 landslide risk should site preparation, replanting, and release not occur or is substantially  
15 delayed.

16 50. NMFS issued an ITS for the Westside Project that anticipates that the project will result  
17 in incidental take in the form of reduced survival rates of in-gravel SONCC coho in the Grider  
18 Creek and Walker Creek watersheds. In the ITS, NMFS did not quantify incidental take of coho  
19 salmon that will result from the Westside Project. Instead, NMFS used as a surrogate for take  
20 quantification the amount of generated fine sediment delivered to streams, as projected by the  
21 ERA model. Term and Condition 2g in the ITS requires the Forest Service to reinitiate  
22 consultation only in the event that project activities increase fine sediment delivery above five  
23 percent (5%), a threshold that is wholly based on the ERA model. Term and Condition 3a in the  
24 ITS states a need for further investigation of relationships between the ERA and other models  
25 and the sediment parameters applied as a surrogate for take quantification. The ITS does not  
26 require the Forest Service to model the “Project ERA” in the future.

1 51. NMFS did not consider project effects on recovery of SONCC coho in the watersheds  
2 that will be adversely affected by the project. The BiOp anticipates that adverse effects will  
3 persist for ten years, but will not reduce the value of critical habitat for recovery.

4 **CLAIMS FOR RELIEF**

5 **FIRST CLAIM FOR RELIEF**

6 **Failure to Account for Short-Term Effects to Listed Species**

7 **and Reliance on Speculative Mitigation Measures**

8 52. Plaintiffs reallege all preceding paragraphs.

9 53. Under Section 7 of the ESA, NMFS opined whether the Westside Project would  
10 jeopardize the continued existence of SONCC coho or adversely modify its critical habitat. 16  
11 U.S.C. § 1536(b)(4).

12 54. NMFS issued a no-jeopardy opinion for the Westside Project.

13 55. The no-jeopardy opinion is arbitrary and capricious because it fails to fully account for  
14 near-term effects of the Westside Project on SONCC coho.

15 56. The no-jeopardy opinion is arbitrary and capricious, because it is based on uncertain and  
16 speculative measures related to restored habitat for SONCC coho.

17 **SECOND CLAIM FOR RELIEF**

18 **Failure to Assess Project Effects on Recovery of Listed Species**

19 57. Plaintiffs reallege all preceding paragraphs.

20 58. Under Section 7 of the ESA, NMFS opined whether the Westside Project would  
21 jeopardize the continued existence of SONCC coho or adversely modify its critical habitat. 16  
22 U.S.C. § 1536(b)(4).

23 59. NMFS issued a no-jeopardy opinion for the Westside Project.

24 60. The no-jeopardy opinion is arbitrary and capricious because NMFS arbitrarily determined  
25 that the Westside Project is not likely to adversely affect SONCC coho critical habitat and reduce  
26 its value for the recovery of the SONCC coho ESU.

27 **THIRD CLAIM FOR RELIEF**

28 **Failure to Utilize an Appropriate Incidental Take Metric**

1 61. Plaintiffs reallege all preceding paragraphs.

2 62. Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(b)(4), and its implementing  
3 regulations, 50 CF.R. 402.14(i), contain requirements for ITSs.

4 63. An ITS must specify the amount or extent of incidental take. It is preferred to compute  
5 take by number of individual members of the affected listed species.

6 64. If a surrogate is used instead, it must perform the same functions as a numeric standard:  
7 to define the extent of permissible take, and set a standard to trigger the requirement to reinitiate  
8 consultation.

9 65. The ITS for the Westside Project illegally fails to quantify take based on SONCC coho.

10 66. The ITS for the Westside Project adopts a surrogate measure of take based on the ERA  
11 model.

12 67. The ITS is arbitrary and capricious because NMFS failed to demonstrate that the use of  
13 the ERA model is reasonable given its flaws.

14 68. The ITS is arbitrary and capricious because it has no demonstrated relationship to  
15 avoiding jeopardy.

#### 16 **FOURTH CLAIM FOR RELIEF**

##### 17 **Failure to Analyze Project's Contribution to Species Recovery**

18 69. Plaintiffs reallege all preceding paragraphs.

19 70. Section 7 requires NMFS to “utilize [its] authorities in furtherance of the purposes of this  
20 Act by carrying out programs for the conservation of endangered species and threatened  
21 species.” 16 U.S.C. § 1536(a)(1).

22 71. The BiOp illegally fails to discuss, analyze, or determine how the Westside Project will  
23 affect the recovery of, or recover, SONCC coho.

#### 24 **PRAYER FOR RELIEF**

25 Based upon the foregoing, Plaintiffs respectfully request that the Court:

- 26 1. Declare that the BiOp and ITS violate the ESA;
- 27 2. Set aside the BiOp and ITS under the APA;

- 1 3. Enjoin the Westside Project pending completion of any reinitiation of consultation on the  
2 project;  
3 4. Grant Plaintiffs attorneys' fees, costs, and other expenses under the Equal Access to  
4 Justice Act ("EAJA");  
5 5. Grant such other relief the Court deems appropriate and necessary.

6  
7 Date: March 3, 2016.

Respectfully submitted,

8 /s/ Tom Wheeler

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