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13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA
15

16 SEQUOIA FORESTKEEPER;)
17 CONSERVATION CONGRESS; EARTH)
18 ISLAND INSTITUTE; OREGON WILD;)
19 CASCADIA WILDLANDS; OUACHITA)
WATCH LEAGUE; UTAH)
20 ENVIRONMENTAL CONGRESS;)
WESTERN WATERSHEDS PROJECT; and)
WILDEARTH GUARDIANS)

21 Plaintiffs,

22 vs.

23 THOMAS TIDWELL, in his official capacity)
24 as Chief of the United States Forest Service,)
and the UNITED STATES FOREST)
25 SERVICE,)
26)

26 Defendant.
27)
28)

Case No.:

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

(Appeals Reform Act, Pub. L. 102-381, Title III, § 322, 106 Stat. 1419 (16 U.S.C. § 1612 note); Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*)

1 **INTRODUCTION**

2 1. This is a challenge to two of the public notice, comment, and administrative
3 appeal regulations that the United States Forest Service promulgated to implement the Appeals
4 Reform Act of 1992, Pub. L. 102-381, Title III, § 322, 106 Stat. 1419 (16 U.S.C. 1612 note)
5 (Oct. 5, 1992) (“ARA”). The challenged regulations are codified at 36 C.F.R. §§ 215.4(a) and
6 215.12(f) (2003). The ARA requires that all “proposed actions of the Forest Service concerning
7 projects and activities implementing land and resource management plans” must be subject to
8 public notice, comment, and administrative appeal, yet the challenged regulations illegally
9 exempt some such proposed actions from notice, comment and appeal. *See* ARA § (a). In fact,
10 the Ninth Circuit has already ruled that these regulations violate the ARA. *Earth Island Inst. v.*
11 *Ruthenbeck*, 490 F.3d 687 (9th Cir 2007), *rev’d on other grounds sub nom. Summers v. Earth*
12 *Island Inst.*, 129 S. Ct. 1142 (2009). For these reasons, the Court should set aside the
13 regulations.

14 **JURISDICTION AND VENUE**

15 2. This court is vested with jurisdiction under 28 U.S.C. §1331(a) (action for
16 declaratory and injunctive relief arising under the constitution and laws of the United States); 28
17 U.S.C. §1361 (action in the nature of mandamus to compel an officer or employee of United
18 States or any agency to perform their duties); 28 U.S.C. §§2201, 2202 (power to issue
19 declaratory or injunctive relief in cases of actual controversy); and 5 U.S.C. §§702-706, because
20 (1) the action arises under the laws of the United States, (2) defendants are sued in their official
21 capacities as officers of the United States and (3) there is a present and actual controversy
22 between the parties.

23 3. All of the actions giving rise to this complaint took place in this District; thus,
24 venue is properly vested in this court pursuant to 28 U.S.C. §1391(e) and 5 U.S.C. § 703.

25 4. There exists now between the parties hereto an actual, justiciable controversy.

26 **PARTIES**

27 5. Plaintiff SEQUOIA FORESTKEEPER is a non-profit corporation residing in
28 Kernville, California. Its mission is to protect and restore the ecosystems of the Southern Sierra

1 Nevada including, but not limited to, the Giant Sequoia National Monument, Sequoia National
2 Forest and Mountain Home State Forest through monitoring, enforcement, education, and
3 litigation. Sequoia ForestKeeper's members, many of whom reside in local areas including
4 Kern, Tulare, and Kings Counties, and others who visit from across the country, use the forests
5 of the Southern Sierra Nevada for activities such as hiking, bird and animal watching, aesthetic
6 enjoyment, quiet contemplation, fishing, scientific study, and biological health. Many of its
7 members also have been actively involved in formulating management policies for public lands
8 and preserving local areas including participating in the establishment and development of the
9 Giant Sequoia National Monument.

10 6. The Forest Service approved the Trail of 100 Giants Improvement Project, on the
11 Sequoia National Forest in California on September 10, 2010, employing a categorical exclusion
12 under its NEPA rules and exempting it from notice, comment and administrative appeal under
13 the regulations challenged here. Some of Sequoia ForestKeeper's members have used the exact
14 tracts of land where the project is occurring, with specific plans to return. They will be directly
15 harmed by this project as approved by the Forest Service. If the Forest Service had given
16 Sequoia ForestKeeper notice and permitted an appeal of the project's approval, it may have been
17 able to convince the Forest Service to change the project in a manner that would reduce the
18 adverse impact to its members.

19 7. The Forest Service has also approved two recreation use permits for mountain
20 biking, including the Mountain & River Adventures Outfitting and Guiding Ten-Year Permit and
21 Sierra South, Inc. Outfitting and Guiding Ten-Year Permit on February 7, 2008, employing a
22 categorical exclusion under its NEPA rules and exempting it from notice, comment and
23 administrative appeal under the regulations challenged here. Some of Sequoia ForestKeepers'
24 members have used the exact trails authorized for mountain biking tours in these ten-year
25 permits through Inventoried Roadless Areas and Giant Sequoia Groves, with specific plans to
26 return. They will be directly harmed by this continued use as authorized by the Forest Service.
27 If the Forest Service had given Sequoia ForestKeeper notice, permitted public comment, and
28 permitted an appeal of the permits' approvals, it may have been able to convince the Forest

1 Service to change the permits in a manner that would reduce the adverse impact to its members.

2 8. Plaintiff CONSERVATION CONGRESS is a non-profit organization
3 incorporated in the state of California, dedicated to maintaining, protecting, and restoring the
4 native ecosystems of northern California. The Conservation Congress has an organizational
5 interest in the proper and lawful management of National Forests located in northern California,
6 especially the Shasta-Trinity National Forest. The Conservation Congress's members, staff, and
7 board members participate in a wide range of wildlife viewing, bird watching, and other
8 recreational activities on the Shasta-Trinity National Forest (STNF) including the Big Mountain
9 project area. The Conservation Congress has been involved in National Forest management
10 issues in northern California since its founding in 2004, and has participated extensively in the
11 scoping process for the Big Mountain project up until the project was excluded from appeal.

12 9. The Forest Service approved the Big Mountain Roads Tree Removal Project on
13 the Shasta-Trinity National Forest in California on Sept. 10, 2010, employing a categorical
14 exclusion under its NEPA rules and exempting it from administrative appeal under the
15 regulations challenged here. Some of Conservation Congress' members have used the exact
16 tracts of land where the project is occurring, with specific plans to return. They will be directly
17 harmed by this project as approved by the Forest Service. If Conservation Congress had been
18 permitted to appeal the project's approval, it may have been able to convince the Forest Service
19 to change the project in a manner that would reduce the adverse impact to its members.

20 10. Plaintiff EARTH ISLAND INSTITUTE ("EII") is a nonprofit corporation
21 organized under the laws of the state of California. EII is headquartered in Berkeley, California.
22 EII's mission is to develop and support projects that counteract threats to the biological and
23 cultural diversity that sustains the environment. Through education and activism, these projects
24 promote the conservation, preservation and restoration of the Earth. One of these projects is the
25 John Muir Project—whose mission is to protect all federal public forestlands from commercial
26 exploitation that undermines and compromises science-based ecological management. EII a
27 membership organization with over 15,000 members in the U.S., over 3,000 of whom use and
28 enjoy the National Forests of California for recreational, educational, aesthetic, spiritual and

1 other purposes. EII, through its John Muir Project, has appealed numerous timber sales on
2 National forests in the Sierra Nevada, and would have appealed the Rim Reforestation Project if
3 given the opportunity, which if implemented would adversely affect the enjoyment of these areas
4 by their members. EII through its John Muir Project has a longstanding interest in protection of
5 national forests. EII's John Muir Project and EII members actively participate in governmental
6 decisionmaking processes with respect to national forest lands in California and rely on
7 information provided through the NEPA processes to increase the effectiveness of their
8 participation. The interests of EII, its John Muir Project and its members will be irreparably
9 harmed if Defendants continue to violate the ARA.

10 11. The Forest Service approved the Rim Reforestation Project, a salvage timber sale,
11 on the Lassen National Forest in California on Jan. 7, 2011, employing a categorical exclusion
12 under its NEPA rules and exempting it from administrative appeal under the regulations
13 challenged here. Some of EII's members have used the exact tracts of land where the project is
14 occurring, with specific plans to return. They will be directly harmed by this project as approved
15 by the Forest Service. If John Muir Project of EII had been permitted to appeal the project's
16 approval, it may have been able to convince the Forest Service to change the project in a manner
17 that would reduce the adverse impact to its members.

18 12. Plaintiff OREGON WILD, formerly Oregon Natural Resources Council, is a
19 charitable, non-profit corporation headquartered in Portland, Oregon with approximately 7,000
20 members and supporters who share our mission to protect and restore Oregon's wildlands,
21 wildlife, and waters as an enduring legacy. We seek to protect the state's remaining old-growth
22 forests and roadless areas, and restore fully-functioning ecosystems and watersheds with a full
23 complement of native species. Oregon Wild has a long record of involvement in decisions
24 affecting burned forests and unroaded areas both of which are ecologically important and under-
25 appreciated within the management framework of the US Forest Service. Oregon Wild
26 commented on and would have appealed the Rainbow Salvage Timber Sale Project if given the
27 opportunity.

28 13. Plaintiff CASCADIA WILDLANDS has approximately 5,000 members and

1 supporters throughout the Cascadia bioregion, many of whom use the forests and waterways of
2 the Umpqua National Forest for recreational, scientific, and aesthetic purposes. Our members
3 are interested in and support our work to protect and restore the ecosystems and species of the
4 Cascadia bioregion. Cascadia Wildlands staff regularly participates in the National
5 Environmental Policy Act planning process on the Umpqua National Forest and works to ensure
6 projects meet the intent of the law. Members of Cascadia Wildlands use and enjoy the project
7 area of the Rainbow Salvage project in its natural state. For instance, members of Cascadia
8 Wildlands and Oregon Wild used and enjoyed the area on November 2, 2010, driving the project
9 area for pleasure, visiting picnic areas and trail heads, and snowshoeing within the project area,
10 and they have definite plans to return.

11 14. The Forest Service approved the Rainbow Salvage Timber Sale Project on the
12 Umpqua National Forest in Oregon on Oct. 19, 2010, employing a categorical exclusion under
13 its NEPA rules and exempting it from administrative appeal under the regulations challenged
14 here. Some of Oregon Wild's & Cascadia Wildlands' members have used the exact tracts of
15 land where the project is occurring, with specific plans to return. They will be directly harmed
16 by this project as approved by the Forest Service. If Oregon Wild and Cascadia Wildlands had
17 been permitted to appeal the project's approval, it may have been able to convince the Forest
18 Service to change the project in a manner that would reduce the adverse impact to its members.

19 15. Plaintiff OUACHITA WATCH LEAGUE is a coalition of about 60 organizations
20 and 350 individuals. It was formed in 1989 as a coalition to bring about better management and
21 true multiple use of the Ouachita National Forest. Ouachita Watch League members have
22 participated in forest planning, have filed numerous comments on both the forest plan and
23 project level and appealed forest service decisions. Its members also use the Ouachita National
24 Forest for recreation and health purposes, which uses are adversely affected when the Forest
25 Service approves ill-advised actions that harm the forest.

26 16. The Forest Service approved the Jack Creek and Square Rock Burn Units on the
27 Ouachita National Forest in Arkansas on March 16, 2011, employing a categorical exclusion
28 under its NEPA rules and exempting them from administrative appeal under the regulations

1 challenged here. Some of Ouachita Watch League's members have used the exact tracts of land
2 where the project is occurring, with specific plans to return. They will be directly harmed by this
3 project as approved by the Forest Service. If Ouachita Watch League had been permitted to
4 appeal the project's approval, it may have been able to convince the Forest Service to change the
5 project in a manner that would reduce the adverse impact to its members.

6 17. Plaintiff UTAH ENVIRONMENTAL CONGRESS is a Utah non-profit
7 conservation organization based in Salt Lake City, Utah. Its mission is to maintain, protect, and
8 restore the native ecosystems on public lands within Utah. Utah Environmental Congress
9 represents more than 250 members, 30 organizations, and 75 businesses, representing
10 approximately 30,000 individuals. Its members recreate and visit the public lands in south and
11 central Utah and have a direct interest in their management. They enjoy the biological diversity
12 and harmony of the natural ecosystems of the forests. Utah Environmental Congress' members
13 have hiked, bird-watched, studied plants and animals and otherwise enjoyed the recreational and
14 aesthetic resources of the Manti-La Sal National Forest. Its collective membership includes
15 professional photographic businesses and freelance photographers who make part of their living
16 from the health, biodiversity and beauty of these forests and the land and biological resources in
17 the Forest. The logging of National Forest without proper safeguards causes and will cause
18 substantial injury to Plaintiff's members' use and enjoyment of National Forests in Utah.

19 18. The Forest Service approved the Skyline Tractor Salvage project on the Manti-La
20 Sal National Forest in Utah on Feb. 4, 2011, employing a categorical exclusion under its NEPA
21 rules and exempting it from administrative appeal under the regulations challenged here. Some
22 of Utah Environmental Congress' members have used the exact tracts of land where the project
23 is occurring, with specific plans to return. They will be directly harmed by this project as
24 approved by the Forest Service. If Utah Environmental Congress had been permitted to appeal
25 the project's approval, it may have been able to convince the Forest Service to change the project
26 in a manner that would reduce the adverse impact to its members.

27 19. Plaintiff WESTERN WATERSHEDS PROJECT is a regional, membership, not-
28 for-profit conservation organization, dedicated to protecting and conserving the public lands and

1 natural resources of watersheds in the American West, with its headquarters at the Greenfire
2 Preserve in Custer County, Idaho. Western Watersheds Project is supported by more than 1,400
3 members located throughout the United States, and also has staff located in Wyoming, Idaho,
4 Utah, Arizona, Montana, and California. Through these staff, and with the assistance of
5 numerous unpaid members and supporters, Western Watersheds Project is deeply involved in
6 seeking to improve management on federal public lands, including on the federal lands at issue
7 in this case, and has members that use Forest Service lands throughout the west whose use of
8 those lands is harmed when the Forest Service approves projects in an unwise manner.

9 20. The Forest Service approved the Slate Creek Corrals Special Use Permit Project
10 on the Bridger-Teton National Forest in Wyoming on June 9, 2010, employing a categorical
11 exclusion under its NEPA rules and exempting it from administrative appeal under the
12 regulations challenged here. Some of Western Watersheds Project's members have used the
13 exact tracts of land where the project is occurring, with specific plans to return. They will be
14 directly harmed by this project as approved by the Forest Service. If Western Watersheds
15 Project had been permitted to appeal the project's approval, it may have been able to convince
16 the Forest Service to change the project in a manner that would reduce the adverse impact to its
17 members.

18 21. Plaintiff WILDEARTH GUARDIANS is a nonprofit conservation organization
19 with offices in Denver, Colorado and Santa Fe, New Mexico. It brings suit on its own behalf and
20 on behalf of its members. WildEarth Guardians protects and restores the forests and other wild
21 places of the American West. Towards this end, WildEarth Guardians and its members work to
22 promote appropriate use of National Forests, and to oppose harmful proposals on National
23 Forests. WildEarth Guardians has approximately 4,500 members, many of whom live, work
24 and/or recreate on National Forests and in adjacent communities.

25 22. The Forest Service approved the White Mesa Uranium Exploration project on the
26 Cibola National Forest in New Mexico on Sept. 17, 2010, employing a categorical exclusion
27 under its NEPA rules and exempting it from administrative appeal under the regulations
28 challenged here. Some of WildEarth Guardians' members have used the exact tracts of land

1 where the project is occurring, with specific plans to return. They will be directly harmed by this
2 project as approved by the Forest Service. If WildEarth Guardians had been permitted to appeal
3 the project's approval, it may have been able to convince the Forest Service to change the project
4 in a manner that would reduce the adverse impact to its members.

5 23. The challenged regulations harm the plaintiffs and their members by denying
6 them the opportunity to affect changes to the projects in a manner that would eliminate or reduce
7 the impacts of the projects to their use of the land and to their other health and aesthetic interests.
8 Success in this suit would redress plaintiffs' injuries by giving them and their members the
9 opportunity to modify these Forest Service projects through comment and appeal in a manner
10 that would lessen harm to their interests.

11 24. Defendant THOMAS TIDWELL is the Chief of the United States Forest Service
12 and is sued in that capacity. The Chief, acting for the Secretary of Agriculture, is charged under
13 the ARA with establishing the notice and comment process for proposed actions of the Forest
14 Service concerning projects and activities implementing land and resource management plans
15 and modifying the procedures for appeals of decisions concerning such projects.

16 25. The defendant UNITED STATES FOREST SERVICE is an agency within the
17 United States Department of Agriculture, and promulgated the challenged regulations.

18 **FACTS**

19 26. Before 1992, the United States Forest Service for decades had regulations
20 providing for public comment and appeal of decisions concerning projects and activities such as
21 timber sales, fuels treatments, road and facility construction, range management and
22 improvements, wildlife and fisheries habitat improvement measures, forest pest management
23 activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and
24 establishment or expansion of winter sports or other special recreation sites. 36 C.F.R. §
25 217.3(b) (1992). The Forest Service would officially memorialize its approval of these projects
26 in "decision documents." Minor actions such as routine building maintenance and individual
27 Christmas tree cutting permits could be approved without "decision documents" and were not
28 subject to appeal. Id. § 217.3(a)(1). However, documented decisions were appealable,

1 regardless of whether they were subject to the requirement of an “environmental analysis” (EA)
2 or “environmental impact statement” (EIS) under the National Environmental Policy Act, 42
3 U.S.C. 4321 et seq. (NEPA). See 57 Fed. Reg. 43,180, 43,208-10 (Sept. 18, 1992) (listing
4 decisions excluded from NEPA review that required a decision document and minor activities
5 that did not).

6 27. In 1992, the Forest Service proposed eliminating administrative appeal of project-
7 level decisions. 57 Fed. Reg. 10,444 (Mar. 26, 1992). The proposal was widely opposed, and
8 Congress responded by enacting the Forest Service Decisionmaking and Appeals Reform Act
9 (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. § 1612 note), which provides:

10 (a) In general.—In accordance with this section, the Secretary of Agriculture,
11 acting through the Chief of the Forest Service, shall establish a notice and
12 comment process for proposed actions of the Forest Service concerning projects
13 and activities implementing land and resource management plans developed
14 under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16
15 U.S.C. 1601 et seq.) and shall modify the procedure for appeals of decisions
16 concerning such projects.

17 (b) Notice and Comment.—

18 (1) Notice.—Prior to proposing an action referred to in subsection (a), the
19 Secretary shall give notice of the proposed action, and the availability of
20 the action for public comment

21 (2) Comment.—The Secretary shall accept comments on the proposed
22 action within 30 days after publication of the notice in accordance with
23 paragraph (1).

24 (c) Right to appeal.—Not later than 45 days after the date of issuance of a
25 decision of the Forest Service concerning actions referred to in subsection (a), a
26 person who was involved in the public comment process under subsection (b)
27 through submission of written or oral comments or by otherwise notifying the
28 Forest Service of their interest in the proposed action may file an appeal.

29 ARA § 322. Congress’s rejection of the Forest Service’s attempt to eliminate appeals and its
30 establishment of statutory notice, comment, and appeal requirements reflected its intent to “allow
31 for continued citizens’ rights to participate in, and appeal decisions of, the Forest Service while
32 providing for more timely consideration of such appeals.” 138 Cong. Rec. H9870-02 (Sept. 30,
33 1992) (Conference Report).

34 28. Nonetheless, when the Forest Service promulgated its first ARA regulations in
35 1993, it provided that all decisions “categorically excluded” from analysis in an EA or EIS were

1 exempt from comment and appeal under the ARA, except for timber sale decisions. Because
2 those regulations unlawfully excluded from ARA procedures decisions “concerning projects and
3 activities implementing land and resource management plans,” ARA § 322(a), they were
4 challenged in federal court, resulting in a consent judgment. *Heartwood v. U.S. Forest Serv.*,
5 Civ. No. 99-4255 (S.D. Ill.) (Sept. 15, 2000). The consent judgment required the Forest Service
6 to make ten categories of categorically excluded actions in addition to timber sales (such as
7 controlled burns for fuel treatment, mineral exploration and development of motorized recreation
8 trails) subject to comment and appeal under interim rules, and the Forest Service did so. 65 Fed.
9 Reg. 61,302 (Oct. 17, 2000). The consent judgment contemplated that the Forest Service would
10 issue new permanent ARA regulations, but it did not govern their substance. *Id.*

11 29. The Forest Service finalized its permanent regulations, including the rules at issue
12 here, in June 2003. 68 Fed. Reg. 33,582 (June 4, 2003). Under the new rules, the Forest Service
13 expanded the exemption from ARA notice, comment and appeal procedures to cover *all*
14 decisions categorically excluded from NEPA analysis. 36 C.F.R. § 215.4(a), 215.12(f) (2003).
15 The exempted actions included timber sales up to 250 acres, forest-thinning up to 1,000 acres,
16 prescribed burns up to 4,500 acres, and other substantive agency actions. 36 C.F.R. § 220.6(e).
17 The Forest Service implemented the rules immediately and began carrying out projects without
18 affording comment and appeal rights to the public, including the plaintiffs here.

19 30. The rules were successfully challenged in the Eastern District of California in
20 2003, and the Ninth Circuit later upheld the district court’s judgment that the rules violated the
21 ARA, finding: “The Forest Service, to comply with the ARA, must promulgate regulations that
22 preserve administrative appeals for any decisions subject to administrative appeal before the
23 proposed changes in 1992. Had Congress wanted to categorically eliminate the right of appeal
24 for timber sales and other categorically excluded Forest Service actions, the ARA would not
25 have been necessary.” *Earth Island Inst. v. Ruthenbeck, supra*, 490 F.3d at 698. However, on
26 March 3, 2009, the United States Supreme Court reversed the Ninth Circuit on standing,
27 allowing the challenged regulations to spring back to life after being enjoined for 3 ½ years.
28 *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009). However, the Supreme Court did not

1 address the Ninth Circuit's holding on the merits that the challenged regulations violate the
2 ARA. *Id.*

3 31. The Forest Service has begun utilizing the previously-enjoined regulation again,
4 and has approved many projects and excluded them from public notice, comment and appeal
5 since 2009, including some in this judicial district. These projects include but are not limited to
6 the projects discussed in the "Parties" section above, where Plaintiffs discuss how these projects
7 harm their interests.

8 **CLAIM FOR RELIEF**

9 32. The above paragraphs are incorporated here by reference.

10 33. The Forest Service has violated ARA sections 322(a) and 322(c) by issuing
11 regulations codified at 36 C.F.R. §§ 215.4(a) and 215.12(f) (2003), which exempt all decisions
12 that are categorically excluded from NEPA analysis but which implement forest plans and are
13 approved with "decision documents," from public notice, comment, and appeal, and by applying
14 these regulations to exclude many projects from public notice, comment and/or appeal. By doing
15 so, the defendant has taken final agency actions that are arbitrary, capricious, and not in
16 accordance with law, and which should be set aside under the judicial review provision of the
17 APA, 5 U.S.C. § 701 *et seq.*

18 **REQUEST FOR RELIEF**

19 34. For these reasons, plaintiffs request that the Court:

- 20 a) Declare that the Forest Service violated the ARA by issuing public notice, comment, and
21 administrative appeal regulations that are arbitrary, capricious, and not in accordance with law;
22 b) Set aside the challenged regulations pursuant to the APA, 5 U.S.C. § 706(2);
23 c) Award plaintiffs their costs and attorneys' fees under the Equal Access to Justice Act, 28
24 U.S.C. § 2412; and
25 d) Provide such other relief as the Court deems just and proper.
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27 Respectfully submitted this ____ day of _____ 2011,
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/s/ René Voss
René Voss

/s/ Matt Kenna (as authorized on 4/28/2011)
Matt Kenna
Applicant *Pro Hac Vice*

Attorneys for Plaintiff