

1 James Jay Tutchton (CA State Bar # 150908)  
Tutchton Law Office  
2 6439 E. Maplewood Ave.  
Centennial, CO 80111  
3 (720) 301-3843  
E-mail: jtutchtontlo@gmail.com

4  
5 Marianne Dugan, *pro hac vice* (Oregon State Bar # 932563)  
E-mail address mdugan@mdugan.com  
259 E. 5th Ave., Ste 200-D  
6 Eugene, OR 97401  
(541) 338-7072  
7 Fax no. 866-650-5213

8 Attorneys for Plaintiff

9  
10 IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

11 CONSERVATION CONGRESS

No.

12 Plaintiff,

13 v.

14 UNITED STATES FOREST SERVICE and  
UNITED STATES FISH AND WILDLIFE  
15 SERVICE,

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF  
(NEPA, ESA, and APA)

16 Defendants.

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17 **INTRODUCTION**

18 1. This lawsuit challenges three logging projects proposed to take place on the  
19 Grindstone Ranger District ("the District") on the Mendocino National Forest, a unit of National  
20 Forest managed by the U.S. Forest Service (USFS). The three projects are Tatham Ridge Fuels  
21 Project ("Tatham Project"); M9 Sanitation and Salvage Project ("M9"); and Log Springs  
22 Commercial Thinning Project ("Log Springs").

23 2. The lawsuit challenges the decision of the USFS to "categorically exclude" these  
24

1 projects from environmental analysis under the National Environmental Policy Act (NEPA) and  
2 the USFS's failure to consider the cumulative impacts of these projects under NEPA; and also  
3 challenges the actions of both the USFS and FWS under the Endangered Species Act (ESA)  
4 regarding the Tatham Project.

5 3. This is a civil action for declaratory and injunctive relief under the Administrative  
6 Procedures Act (APA), 5 U.S.C. 551-706, and the ESA, 16 U.S.C. 1531 et seq. The claims arise  
7 from both defendants' violation of the Endangered Species Act (ESA), 16 U.S.C. 1531 et seq.,  
8 and its implementing regulations, 50 C.F.R. 402.01-402.16; and from USFS's violations of the  
9 National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370(d), and its implementing  
10 regulations, 40 C.F.R. 1500-1508.

11 4. This action is brought pursuant to the right of review provision of the APA, 5  
12 U.S.C. 702), and the citizen suit provision of the ESA, 16 U.S.C. 1540(g)(1)(C).

13 5. Defendant USFS violated the Endangered Species Act in making a finding that  
14 the Tatham Project is likely to affect, but will not adversely affect, the northern spotted owl  
15 (NSO).

16 6. Defendant FWS violated the Endangered Species Act in issuing a concurrence  
17 agreeing with USFS's decision that the Tatham Project is likely to affect, but will not adversely  
18 affect, the NSO.

19 7. Plaintiff also challenges defendant USFS's failure to meet its procedural and  
20 substantive duties required by NEPA by failing to adequately perform environmental review for  
21 the three projects, and USFS's decision to invoke a "categorical exclusion" to NEPA for these  
22 projects.

23 8. Plaintiff seeks:

24 a. An order declaring that defendant USFS failed to comply with NEPA;

- 1 b. An order declaring that both defendants failed to comply with the ESA;
- 2 c. An order enjoining defendant USFS from undertaking activities on the three
- 3 projects unless and until defendant USFS complies with the NEPA and the APA;
- 4 d. An order enjoining defendant USFS from undertaking activities on the Tatham
- 5 Project unless and until defendant USFS complies with the ESA and the APA,
- 6 and unless and until defendant FWS complies with the ESA;
- 7 e. An award of Plaintiff's reasonable attorneys' fees and costs associated with this
- 8 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412 and/or the
- 9 Endangered Species Act, 16 U.S.C. 1540(g)(4);
- 10 f. Such additional and further relief as the Court deems just and equitable.
- 11 9. The requested relief is necessary to preserve the *status quo*, to prevent illegal
- 12 agency action, and to forestall irreparable injury to the environment.

### 13 JURISDICTION AND BASIS FOR RELIEF

14 10. This Court properly has jurisdiction over this action under 28 U.S.C. 1331  
15 because this lawsuit presents a federal question under the laws of the United States, including the  
16 Endangered Species Act ("ESA"), 16 U.S.C. 1531 *et seq.*, the National Environmental Policy  
17 Act ("NEPA"), 42 U.S.C. 4321 *et seq.*, the Administrative Procedure Act ("APA"), 5 U.S.C. 701  
18 *et seq.*, and the Declaratory Judgment Act ("DJA"), 28 U.S.C. 2201 *et seq.* The Court also has  
19 jurisdiction under 28 U.S.C. 1346 (United States as defendant); 28 U.S.C. 1361 (action to  
20 compel an officer of the United States to perform her duty); and 16 U.S.C. 1540(g) (ESA citizen  
21 suit provision).

22 11. Judicial review is authorized by 5 U.S.C. 706 because plaintiff is adversely  
23 affected within the meaning of NEPA, and is authorized by 16 U.S.C. 1540(g)(1)(C) (the ESA  
24 citizen suit provision).

1           12.     More than 60 days prior to commencing this action, Plaintiff provided defendants  
2 and the Secretary of the Interior with written notice of the ESA claims asserted in this action as  
3 required by 16 U.S.C. 1540(g)(2)(A)(i).

4           13.     Declaratory relief is appropriate under 5 U.S.C. 703 and 706 (APA), 16 U.S.C.  
5 1540(g)(1)(A) (ESA), and 28 U.S.C. 2201(a) and 2202 (DJA). Neither defendant has taken  
6 action to remedy the violations of the ESA explained in plaintiff's notice letter. Accordingly, an  
7 actual controversy, within the meaning of the Declaratory Judgment Act, exists between plaintiff  
8 and defendants.

9           14.     Injunctive relief is appropriate under 5 U.S.C. 703, 16 U.S.C. 1540, and 28 U.S.C.  
10 2202.

11           15.     Plaintiff has exhausted all administrative remedies available to it as required by  
12 the APA.

13                           **VENUE AND INTRADISTRICT LOCATION OF FILING**

14           16.     The final decisions giving rise to this complaint were made in Willows (Glenn  
15 County), California, by the Grindstone District Ranger and the Mendocino Forest Supervisor.  
16 Venue is properly vested in this Court by 28 U.S.C. 1391(e) and 16 U.S.C. 1540(g)(3)(A).

17           17.     This case should be assigned to the Sacramento Division of this Court because the  
18 three projects are located in Tehama County and the directly responsible office of the United  
19 States Forest Service is located in Glenn County. L.R. 120(d).

20                           **PARTIES**

21           18.     The Conservation Congress (the CC) is a non-profit 501(c)(3) organization  
22 incorporated in the state of California, dedicated to maintaining, protecting, and restoring the  
23 native ecosystems of northern California. The CC has an organizational interest in the proper  
24 and lawful management of National Forests located in northern California, especially the

1 Mendocino National Forest. The CC's members, staff, and board members participate in a wide  
2 range of wildlife viewing, bird watching, and other recreational activities on the Mendocino  
3 National Forest, including the three project areas and the surrounding lands. The CC represents  
4 individuals, organizations, and businesses, many of whom have visited the Mendocino National  
5 Forest and the watersheds and associated forests that will be impacted by the three projects, who  
6 have specific and concrete plans to visit those watersheds and forests in the near future, and who  
7 have a direct interest in its management. The CC has been involved in National Forest  
8 management issues in northern California since its founding. Its members have hiked, fished,  
9 hunted and photographed the Mendocino National Forest, including the portions of the  
10 Grindstone Ranger District that would be affected by the three projects. Its collective  
11 membership includes professional photography businesses and freelance photographers that  
12 make their living in part by photographing northern California's National Forests, including the  
13 Mendocino National Forest. The procedural harm and direct physical impacts associated with  
14 this decision detract from the ability of its members to be involved in the decision-making  
15 process of the public lands as well as the outstanding natural beauty and biodiversity that makes  
16 these lands in and adjacent to the three project areas so appealing to CC's members who utilize  
17 these lands. The CC has participated in both the scoping and comment phases associated with  
18 the three projects. The CC would sustain injury to its interests if the three projects are  
19 undertaken in the absence of a legally and scientifically sufficient analysis of the project's  
20 environmental impacts and protection of the northern spotted owl. The interests of plaintiff and  
21 its members would sustain further injury because the project will diminish aesthetic and  
22 recreational value, and harm wildlife and their habitat in and around the project area.  
23 Conservation Congress's members, officers, and staff pursue, and have concrete plans to  
24 continue pursuing, these aesthetic, scientific, business and recreational activities in the

1 Mendocino National Forest's Grindstone Ranger District, including on the lands involved in the  
2 three projects and surrounding areas. These interests of Conservation Congress, its members,  
3 officers, and staff are substantial and are adversely affected by defendants' failure to comply  
4 with the ESA and NEPA. The requested relief will redress the injuries of Conservation Congress  
5 and its members, officers, and staff.

6 19. Defendant USFS is a federal agency within the U.S. Department of Agriculture.  
7 Defendant is, by law, responsible for the management policies and actions undertaken with  
8 respect to the public lands. By statutory authority, and the agency's own regulations, defendant  
9 is also responsible for implementing NEPA, ESA, and other laws and regulations pertaining to  
10 actions and decisions on lands administered by defendant.

11 20. Defendant FWS is a federal agency within the U.S. Department of the Interior  
12 that is delegated with the authority to implement the ESA and protect ESA-listed species.

### 13 SUMMARY OF FACTS

#### 14 Procedural History - Tatham Project

15 21. In late May 2012, Acting District Ranger Victoria Stoll, on behalf of District  
16 Ranger Eduardo Olmedo, signed the Decision Memo for the Tatham Project, authorizing the  
17 project under a "categorical exclusion" from NEPA.

18 22. Plaintiff commented on the Tatham Project and administratively appealed the  
19 Tatham Decision Memo to the Mendocino Forest Supervisor.

20 23. The Supervisor rejected plaintiff's administrative appeal.

21 24. In late April 2012, defendant USFS issued a "Biological Assessment" concluding  
22 that the Tatham Project "may affect but is not likely to adversely affect" the NSO and its critical  
23 habitat.

24 25. In late May 2012, FWS issued a letter stating: "[W]e concur with your  
25

1 assessment that the Project may affect, but is not likely to adversely affect northern spotted owl,  
2 [or] northern spotted owl critical habitat."

3 **Procedural History - M9 Project**

4 26. In late June 2012, District Ranger Eduardo Olmedo signed the Decision Memo  
5 for the M9 Project, authorizing the project under a "categorical exclusion" from NEPA.

6 27. Plaintiff commented on the M9 Project and administratively appealed the M9  
7 Decision Memo to the Mendocino Forest Supervisor.

8 28. The Supervisor rejected plaintiff's administrative appeal.

9 **Procedural History - Log Springs Project**

10 29. In late June 2012, District Ranger Eduardo Olmedo signed the Decision Memo  
11 for the Log Springs Project, authorizing the project under a "categorical exclusion" from NEPA.

12 30. Plaintiff commented on the Log Springs Project and administratively appealed the  
13 Log Springs Decision Memo to the Mendocino Forest Supervisor.

14 31. The Supervisor rejected plaintiff's administrative appeal, asserting that plaintiff  
15 had not timely filed the administrative appeal.

16 32. Plaintiff asserts that it timely filed the administrative appeal.

17 **The Tatham Project**

18 33. The Tatham Project is located in the Buttermilk Late Successional Reserve,  
19 Whiskey Saddle, and Thomes Creek Back Country, about seven miles west of Paskenta,  
20 California.

21 34. The Tatham Project consists of about 900 acres of "shaded fuel break  
22 construction," 1800 acres of prescribed burning, and 1300 acres of plantation thinning.

23 35. The fuelbreak would be 6.2 miles long, up to 500 feet wide.

24 36. Vegetation types include mixed chaparral (at lower elevations), mixed conifer

1 (Ponderosa Pine, Sugar Pine, Douglas Fir, Incense Cedar) and fir stands.

2 37. Almost half of the project is within the Buttermilk Late-Successional Reserve  
3 (LSR) – 338 acres of the proposed fuelbreak, 557 acres of thinning, and 675 acres of the  
4 prescribed burning.

### 5 **The M9 and Log Springs Projects**

6 38. The M9 and Log Springs projects are located within 10 to 15 miles southwest of  
7 the community of Paskenta, California, near the M9 road; and Log Springs is within the M9  
8 project area.

9 39. The Log Springs project involves commercially thinning about 70 acres of 50  
10 to 70-year-old stands of planted ponderosa pine.

11 40. The M9 project involves harvest of about 250 acres of live trees which the Forest  
12 Service states are "dying," as well as "dead" trees.

13 41. The Land and Resource Management Plan for the North Grindstone area notes  
14 that potential habitat may exist for sensitive species *Fritillaria pluriflora*, *Antirrhinum*  
15 *subcordatum*, and *Eriastrum brandegeae*.

16 42. A Late-Successional Reserve is adjacent to the Log Springs/M9 project area.

17 43. The M9/Log Springs project area contains habitat for northern spotted owl  
18 (NSO), bats, marten, fisher, and goshawk; and there is suitable NSO habitat within a half mile of  
19 the project area.

20 44. The M9/Log Springs documents contain no analysis of the benefits of both  
21 beetles and fire to NSO habitat, for example, in creating snags.

### 22 **The Northwest Forest Plan**

23 45. The Forest Service amended the Mendocino Forest Plan ("Forest Plan") with a  
24 region-wide 1994 Record of Decision commonly referred to as the Northwest Forest Plan



1 (NWFP), which sets forth standards and guidelines that are in addition to those set forth in the  
2 Forest Plan.

3 46. The NWFP was implemented, in part, to protect the northern spotted owl.

4 **Late-Successional Reserves**

5 47. The NWFP established Late Successional Reserves ("LSRs") -- areas in which  
6 logging and other ground-disturbing activities are generally prohibited to protect the ecosystem  
7 and conserve the northern spotted owl and other species.

8 48. The Mendocino National Forest's management emphasis for the Buttermilk  
9 Springs LSR is on protecting and enhancing conditioned of late-successional and old-growth  
10 forest ecosystems, which serve as habitat for old-growth related species including the northern  
11 spotted owl.

12 49. The Buttermilk LSR is the largest LSR on the Forest and is a crucial link between  
13 Yolla Bolly-Middle Eel Wilderness on the north, the Grizzly LSR (RC 310) to the southwest and  
14 the Refuge LSR (RC 311) on the south.

15 50. The Buttermilk LSR has been identified as the only fully functioning LSR within  
16 the Forest.

17 **Northern Spotted Owl (NSO)**

18 **A. NSO within the Tatham project area**

19 51. Past surveys have detected NSO in the Tatham Project action area, and nine NSO  
20 activity centers are documented in the project area; however, NSO surveys in the project area  
21 have not been conducted since 2006.

22 **B. Listing of NSO under the Endangered Species Act**

23 52. The northern spotted owl (NSO), *strix occidentalis caurina*, is a cavity nester that  
24 tends to live its adult life in the same territory, and it is listed as threatened under the Endangered  
25

1 Species Act (ESA). 55 Fed. Reg. 26114 (1990).

2 53. The listing of the NSO as threatened was prompted in part by the loss of 60 to 88  
3 percent of its habitat throughout its range, primarily due to timber harvest and land conversions.  
4 55 Fed. Reg. at 26175.

5 54. Since the government approval of the Northwest Forest Plan, over 80,000 acres of  
6 spotted owl habitat have been removed, downgraded, or degraded.

7 **C. NSO "critical habitat units" (CHU)**

8 55. FWS delineated the critical habitat for the NSO in 1992 after being ordered to do  
9 so by the federal courts, 57 Fed. Reg. 1796 (1992); Northern Spotted Owl v. Lujan, 758 F. Supp.  
10 621 (W.D. Wash. 1991), and has updated the critical habitat designation since then.

11 56. The FWS' primary objective in designating critical habitat for the NSO was to  
12 identify existing NSO habitat and to designate and protect specific areas where NSO habitat  
13 management should be given highest priority.

14 **D. NSO critical habitat within the Tatham project area**

15 57. The entire Buttermilk LSR is designated as critical habitat (CHU) for the NSO;  
16 but habitat for NSO is patchy in the south part of the Tatham Project action area, making habitat  
17 in the north even more important for survival of NSO.

18 58. USFS acknowledges that "on the Mendocino National Forest other vegetation  
19 types are well represented, and the protection and enhancement of habitat with late-successional  
20 characteristics is the most important aspect of recovering spotted owls."

21 59. USFS acknowledges that, of the nine NSO activity centers in the action area, all  
22 are severely below recommended FWS habitat thresholds for home range and core.

23 **E. NSO "suitable" habitat within the critical habitat**

24 60. The NSO Critical Habitat in the action area is 65,890 acres (the LSR is 65,803  
25

1 acres), but of this acreage only about 49% – 31,982 acres – is "suitable" NSO habitat.

2 61. The nine NSO activity centers, combined, contain about 8300 acres of the suitable  
3 habitat.

4 62. In evaluating the Tatham Project, defendants analyzed habitat for the owl using  
5 the entire CHU/LSR, including non-habitat and unsuitable habitat, and did not separately  
6 evaluate impacts to the suitable habitat.

7 **F. Amount of NSO critical habitat that will be affected by the Tatham project**

8 63. Logging for the Tatham Project would occur in most of the nine NSO activity  
9 centers.

10 64. The Tatham Project will "degrade" 437 acres of NSO nesting/roosting habitat,  
11 760 acres of foraging habitat; and 2,016 acres of dispersal habitat, for a total of 3,213 acres  
12 degraded NSO habitat.

13 65. The Project will also "remove" six acres of NSO habitat to produce log landings,  
14 resulting in "long-term loss of forested cover" according to USFS.

15 66. Of the 26,950 Tatham Project "action area" acres, 26 percent (and 38 percent of  
16 the national forest land within that action area) are within the Buttermilk LSR.

17 67. 13 percent of the Tatham treatment sites would be in NSO nesting/roosting  
18 habitat and 22 percent would be in foraging habitat.

19 **G. Impact of fuelbreaks on NSO habitat in the Tatham project area**

20 68. Fuelbreaks by definition require the "removal" of habitat under FWS definitions.

21 69. The proposed 6.2-mile-long, 500-foot wide fuelbreak for the Tatham Project  
22 would occur in parts of four NSO activity centers (two of which overlap), including a significant  
23 amount of nesting/roosting and foraging habitat.

24 70. The fuelbreak would degrade and/or destroy nesting/roosting and foraging  
25

1 habitat, and may adversely affect dispersal of juveniles and habitat for "floaters" because the  
2 length of the fuelbreak would make it difficult for dispersing NSO to avoid.

3 71. The wide fuelbreak would also likely reduce or eliminate habitat for NSO prey.

4 72. In general, fuelbreaks have to be re-entered every 10 to 20 years, thereby  
5 continually negatively affecting owl habitat.

6 **H. 2011 NSO Revised Recovery Plan**

7 73. In evaluating the Tatham Project, the USFS relied on the 2008 NSO Recovery  
8 Plan which was declared to be illegal and invalid by the courts in 2010.

9 74. In July 2011, FWS issued a final Revised Recovery Plan for the NSO. 76 Fed.  
10 Reg. 38575 (2011).

11 75. The 2011 Recovery Plan recognizes "past habitat loss, current habitat loss and  
12 competition from Barred Owls, *Strix varia*, as the most pressing threats to spotted owl  
13 persistence." 76 Fed. Reg. 38575.

14 76. Based on these factors the Plan recommends increased habitat protection for the  
15 NSO in both occupied and unoccupied areas. Id.

16 77. The 2011 Plan requires an analysis of the short-term impacts to NSO prey, which  
17 was not done for the Tatham Project.

18 78. FWS's 2011 survey protocol for NSO requires three visits to each owl site in  
19 order to better detect spotted owls and barred owls; such visits have not been done.

20 79. The 2011 Recovery Plan states that treatment  
21 should avoid existing high value habitat, if possible, while meeting long-term  
22 restoration goals....[and] should first focus on areas of younger forest less likely to  
23 be used by spotted owls and less likely to develop late-successional forest  
24 characteristics without vegetation management.

24 **I. USFS rationale for the Tatham project**

1 80. USFS justifies the logging within NSO habitat by presenting concerns about the  
2 possibility of fire affecting the LSR, noting that fuels have increased with fire suppression.

3 81. However, the biggest fire threat is likely from the southern end of the action area,  
4 which has lower quality NSO habitat and a sizable amount of chaparral; USFS states "likelihood  
5 of a fire start from this area is high," since it is at lower elevation and has very flammable  
6 vegetation.

7 82. USFS acknowledges that the great majority of past fires in the area have started in  
8 brush or grass.

9 83. Defendants failed to acknowledge or address scientific literature that disagrees  
10 with their fire-related concerns.

11 84. The Forest claims there will be long term beneficial results from the Tatham  
12 project but fails to cite any time frame.

13 **J. Mendocino Forest Plan inventory and monitoring requirements**

14 85. The Mendocino Forest Plan requires USFS to "[c]onduct necessary inventory and  
15 monitoring activities within each LSR to determine population densities and habitat trends for  
16 wildlife species dependent on older mature forested habitats." Forest Plan at IV-67.

17 86. USFS has not conducted the inventory and monitoring to determine the  
18 population densities and habitat trends of the NSO within the Buttermilk LSR.

19 **K. Cumulative impacts to NSO and baseline**

20 87. Analysis of impacts to species under the ESA requires review of the  
21 "environmental baseline" for the species.

22 88. The "environmental baseline" used by USFS in evaluating the impacts to NSO  
23 was not up to date.

24 89. In addition to the impacts of the Tatham Project itself, the cumulative impacts of  
25

1 this project combined with other federal projects within the Buttermilk LSR (which must be  
2 addressed under NEPA, 40 C.F.R. 1508.7, 1508.25(a)(2)), may affect the NSO, including the  
3 Smokey Project, Sugar Project, Hardin Fuels Project, Snow Basin Timber Sale, and Brewer's  
4 Fuels Project.

5 90. These other federal projects being planned or carried out collectively cover 71  
6 percent of the LSR/CHU.

7 91. Under its own rules, USFS cannot "treat" (log) more than 25% of suitable owl  
8 habitat within a home range per year and cannot treat more than 35% suitable habitat in the core  
9 areas of activity centers.

10 92. Based on statistics from past, current, and foreseeable actions, it appears likely  
11 that more than 25% of the home ranges and 35% of the core areas of the activity centers will be  
12 treated within a single year.

### 13 **Summary of Requirements under the Endangered Species Act (ESA)**

14 93. The Endangered Species Act (ESA) provides many benefits to a listed species in  
15 order to encourage its recovery.

16 94. One such important benefit is the requirement in Section 4(f) of the ESA that  
17 FWS "develop and implement [recovery] plans for the conservation and survival of [all listed]  
18 endangered species and threatened species ... unless [it] finds that such a plan will not promote  
19 the conservation of the species." 16 U.S.C. 1533(f)(1).

20 95. In each recovery plan, FWS shall, to the maximum extent practicable, include "a  
21 description of such site-specific management actions as may be necessary to achieve the plan's  
22 goal," "objective, measurable criteria which, when met, would result in a determination" the  
23 species can be removed from the ESA list, and "estimates of the time required and the cost to  
24 carry out those measures needed to achieve the plan's goal and to achieve intermediate steps

1 toward that goal." 16 U.S.C. 1533(f)(1)(B)(i), (ii) and (iii).

2 96. A second important benefit the ESA conveys to listed species in order to prompt  
3 their recovery is the "designation" of protected "critical habitat." See 16 U.S.C. 1533(a)(3)(A)(i)  
4 (as amended in 1982)(FWS must "to the maximum extent prudent and determinable," designate  
5 critical habitat for all threatened and endangered species concurrently with their listing).

6 97. The ESA defines "critical habitat" as:

7 (i) the specific areas within the geographic area occupied by the species, at the time it is  
8 listed in accordance with the [ESA], on which are found those physical or biological  
9 features (I) essential to the conservation of the species and (II) which may require special  
10 management considerations or protection; and

11 (ii) specific areas outside the geographic area occupied by the species at the time it is  
12 listed in accordance with the [ESA], upon a determination by the Secretary that such  
13 areas are essential for the conservation of the species.

14 16 U.S.C. 1532(5)(A).

15 98. In decisions to designate critical habitat, FWS must make its decision "on the  
16 basis of the best scientific data available." 16 U.S.C. 1533(b)(2).

17 99. In light of economic and other considerations, FWS "may exclude any area from  
18 critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of  
19 specifying such area as part of the critical habitat, unless [it] determines, based on the best  
20 scientific and commercial data available, that the failure to designate such area as critical habitat  
21 will result in the extinction of the species concerned." Id.

22 100. The designation of critical habitat is one of the ESA's primary methods for  
23 conserving species. See 16 U.S.C. 1533(a)(3); see also Bennett v. Spear, 520 U.S. 154, 157-58  
24 (1997) ("[T]he objective of the ESA is to enable listed species not merely to survive, but to  
25 recover from their endangered status. To achieve this objective, Congress required the Secretary  
of the Interior to designate a 'critical habitat' for all listed species.").

101. Critical habitat designation benefits listed species primarily through the ESA's  
consultation mechanism.

1           102. ESA Section 7(a)(2) requires federal agencies to consult with FWS to "insure that  
2 any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the  
3 continued existence of any endangered species or threatened species or result in the destruction  
4 or adverse modification" of that species' designated critical habitat. 16 U.S.C. 1536(a)(2).

5           103. Thus, regardless of whether critical habitat has been designated, the agency action  
6 must consult with FWS regarding whether the action may "jeopardize the continued existence"  
7 of any listed species. Id.

8           104. However, if critical habitat has been designated, the ESA imposes an additional  
9 consultation requirement concerning whether the action may result in the "destruction or adverse  
10 modification" of the species' designated critical habitat. Id.

11           105. To comply with ESA Section 7(a)(2) an action agency, such as USFS in the  
12 present case, generally must prepare a document called a "biological assessment" ("BA"). 16  
13 U.S.C. 1536(c)(1).

14           106. The biological assessment process begins with a request from the action agency to  
15 FWS for information concerning whether any listed species or critical habitat is present in the  
16 Tatham project area. Id.

17           107. After FWS provides this information the action agency then determines, in the  
18 first instance, whether any listed species or critical habitat is likely to be affected by the  
19 proposed action. Id.

20           108. The biological assessment then evaluates whether the species or critical habitat is  
21 likely to be adversely affected or not likely to be adversely affected by the proposed project. 50  
22 C.F.R. 402.12(a).

23           109. If the proposed agency action may affect a listed species or critical habitat, the  
24 action agency must consult with FWS. 16 U.S.C. 1536(a)(2); 50 C.F.R. 402.14(a).

25           110. If the agency action is likely to adversely affect a species or critical habitat, the  
action agency must engage in "formal consultation" with FWS. 50 C.F.R. 402.14(a).



1 111. On the other hand, if the action agency determines that its action is not likely to  
2 adversely affect a species or critical habitat it may engage in "informal consultation" with FWS.  
3 50 C.F.R. 402.13(a); 50 C.F.R.. 402.14(b)(1).

4 112. If, as a result of informal consultation, FWS issues a written "concurrence" to the  
5 action agency that its proposed action is not likely to adversely affect a listed species or critical  
6 habitat, the consultation process ends. 50 C.F.R. 402.13(a); 50 C.F.R.. 402.14(b)(1).

7 113. If the action agency and FWS engage in formal consultation, FWS prepares a  
8 document known as a biological opinion to evaluate whether the proposed action is likely to  
9 jeopardize the continued existence of a listed species or adversely modify its critical habitat. 50  
10 C.F.R. 402.14.

11 114. The biological opinion must be based on the "best scientific and commercial data  
12 available." 16 U.S.C. 1536(a)(2); 50 C.F.R. 402.14(d).

13 115. The biological opinion must include a summary of the information on which it is  
14 based and must adequately detail and assess how the proposed action affects listed species and  
15 their critical habitats. 50 C.F.R. 402.14(h).

16 116. The biological opinion must also include an evaluation of the "cumulative effects  
17 on the listed species or critical habitat." 50 C.F.R. 402.14(g)(3).

18 117. During either informal of formal consultation FWS may suggest to the action  
19 agency modifications to the proposed project to avoid adverse affects to listed species or critical  
20 habitat. 50 C.F.R. 402.13(b) (informal consultation); 50 C.F.R. 402.14(g)(5) (formal  
21 consultation).

22 118. In evaluating the potential for a proposed action to adversely modify critical  
23 habitat, FWS must consider effects on both the survival and recovery of the listed species.

24 119. FWS's regulatory definition for "adverse modification" of critical habitat found in  
25 50 C.F.R. 402.02, which purports to limit the meaning of "adverse modification" to effects on  
critical habitat impacting both the survival and recovery of a listed is facially inconsistent with  
the ESA and has been stuck down by the Ninth Circuit. Gifford Pinchot Task Force v. U.S. Fish

1 and Wildlife Service, 378 F.3d 1059, 1069-70 (9th Cir. 2004), amended by 387 F.3d 968 (9th  
2 Cir. 2004).

3 120. "If new information reveals effects of the action that may affect listed species or  
4 critical habitat in a manner or to an extent not previously considered," reinitiation of consultation  
5 is required. 50 C.F.R. 402.16(b).

6 121. When such new information is discovered either the action agency or FWS must  
7 request reinitiation of consultation. Id.

8 **COUNT I**  
9 **Violation of NEPA**  
10 **(USFS)**

11 **Improper Use of a Categorical Exclusion and**  
12 **Failure to Disclose and Analyze Impacts as Required by NEPA**

13 122. Plaintiff incorporates by reference the foregoing paragraphs.

14 123. The three projects are major federal actions as defined by NEPA.

15 124. NEPA generally requires federal agencies to prepare an Environmental Impact  
16 Statement ("EIS") or an Environmental Assessment ("EA") to evaluate the environmental  
17 impacts of proposed major federal actions. 42 U.S.C. 4332(2)(C); 40 C.F.R. 1508.9(a)(1).

18 125. In narrow situations, neither an EA nor an EIS is required and federal agencies  
19 may invoke a "categorical exclusion" ("C.E.") from NEPA. 40 C.F.R. 1508.4.

20 126. A "categorical exclusion" is defined as "a category of actions which do not  
21 individually or cumulatively have a significant effect on the human environment and which have  
22 been found to have no such effect in procedures adopted by a Federal agency in implementation  
23 of these regulations." 40 C.F.R. 1508.4.

24 127. Each federal agency must develop "specific criteria for and identification of"  
25 actions that qualify for a C.E. 40 C.F.R. 1507.3.

128. The Forest Service has developed criteria for categorically excluded activities in  
its "Environmental Policy and Procedures Handbook" ("Forest Service Handbook," "Handbook,"  
or "FSH").

1           129. Section 1909.15 of the Forest Service Handbook discusses what constitutes an  
2 appropriate use of C.E.'s and specifically documents the agency's list of categorically excluded  
3 activities.

4           130. The Forest Service authorized the three projects under various categorical  
5 exclusions.

6           131. Federal agencies are required to "provide for extraordinary circumstances in  
7 which a normally excluded action may have a significant environmental effect." 40 C.F.R.  
8 1508.4.

9           132. Where a project area contains extraordinary circumstances related to the proposed  
10 action, the Forest Service may not invoke a C.E. and instead must prepare an EA or an EIS.

11           133. The "extraordinary circumstances" that must be considered include, but are not  
12 limited to:

13           a. Federally listed threatened or endangered species or designated critical habitat, species  
14 proposed for Federal listing or proposed critical habitat, or Forest Service sensitive  
species.

15           b. Flood plains, wetlands, or municipal watersheds.

16           c. Congressionally designated areas, such as wilderness, wilderness study areas, or  
national recreation areas.

17           d. Inventoried roadless areas.

18           e. Research natural areas.

19           f. American Indians and Alaska Native religious or cultural sites.

20           g. Archaeological sites, or historic properties or areas.

21           134. The "extraordinary circumstance" of an ESA-listed species (NSO) and its critical  
22 habitat is "related to" the Tatham Project.

1 135. The "extraordinary circumstance" of a Forest Service sensitive species is "related  
2 to" the M9 and Log Springs projects.

3 136. The "extraordinary circumstance" of an ESA-listed species (NSO) and its critical  
4 habitat is "related to" the M9 and Log Springs Projects.

5 137. The three project Decision Memos themselves do not serve as substitutes for an  
6 EA or EIS. For example, in the Tatham DM, while there is some discussion of the possible  
7 cumulative impacts of some of the other federal projects within the LSR/CHU, there is no  
8 collective determination of the impacts to NSO or its critical habitat. The Forest Service has  
9 piecemealed the consideration of impacts on NSO by making determinations of effect only on  
10 the individual projects, not on how they might affect the owl collectively.

11 138. Because USFS relied upon categorical exclusions, USFS also did not consider  
12 reasonable alternatives to the proposed action, as would be required for an EA or EIS (such as an  
13 alternative that would consider chaparral and other flammable vegetation in the southern portion  
14 of the action area, and left the higher quality NSO habitat to the north alone). 40 C.F.R.  
15 1502.14(a).

16 139. Defendant USFS's decision to invoke Categorical Exclusions instead of preparing  
17 EAs or EISes is arbitrary, capricious, not in accordance with law, and without observance of  
18 procedures required by law, within the meaning of the APA, 5 U.S.C. 706.

19 140. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with this  
20 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412.

21 **COUNT II**

22 **(USFS)**

23 **Violation of NEPA**

24 **Failure to Analyze Cumulative Impacts**

25 141. Plaintiff incorporates by reference the foregoing paragraphs.

1 142. NEPA requires federal agencies to analyze cumulative effect of its actions, which  
2 result from the incremental impact of the action when added to other past, present, and  
3 reasonably foreseeable future actions. 40 C.F.R. 1508.25(a).

4 143. The Decision Memos for the three timber sales violate NEPA because they fail to  
5 account for the cumulative effect of the three projects together, and the other past, present, and  
6 reasonably foreseeable timber sales and other ground-disturbing activities.

7 144. These actions were taken not in accordance with law, without observance of  
8 procedures required by law, and are arbitrary and capricious within the meaning of the APA.

9 145. Plaintiff is entitled to recover costs, disbursements and attorney's fees pursuant to  
10 the EAJA.

### 11 **COUNT III**

#### 12 **(USFS)**

#### 13 **Violation of NEPA**

##### 14 **Failure to Prepare Environmental Impact Statement**

15 146. Plaintiff incorporates by reference the foregoing paragraphs.

16 147. NEPA requires a full Environmental Impact Statement (EIS) as opposed to an  
17 Environmental Assessment (EA) if the project may significantly impact the environment.

18 148. Defendant USFS prepared neither an EA nor an EIS for the three projects.

19 149. One of the factors that must be considered when whether a project may  
20 significantly impact the environment is "[t]he degree to which the action may adversely affect an  
21 endangered or threatened species or its habitat that has been determined to be critical under the  
22 Endangered Species Act of 1973." 40 C.F.R. 1508.27(b)(9).

23 150. The three projects, alone and in conjunction with each other and with the other  
24 projects within the LSR/CHU, may significantly impact the environment.

25 151. Defendant USFS's failure to prepare a full EIS is arbitrary, capricious, not in  
accordance with law, and without observance of procedures required by law, within the meaning  
of the APA, 5 U.S.C. 706.

1 152. Plaintiff is entitled to its reasonable fees, costs, and expenses associated with this  
2 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412.

3 **COUNT IV**

4 **(Both Defendants)**

5 **Violation of the Endangered Species Act**

6 **Failure to Conduct Formal Consultation for Tatham**

7 153. Plaintiffs hereby re-allege and incorporate all preceding paragraphs.

8 154. Section 7 of the ESA requires defendant USFS, in consultation with defendant  
9 FWS, to insure that any action authorized, funded or carried out by USFS is not likely to (1)  
10 jeopardize the continued existence of any threatened or endangered species or (2) result in the  
11 destruction or adverse modification of critical habitat of such species. 16 U.S.C. 1536(a)(2).

12 155. In fulfilling this requirement, agencies must use "the best scientific and  
13 commercial data available." Id.

14 156. If USFS determines that an action "may affect" a listed species or its critical  
15 habitat, the agency must initiate formal consultation with FWS. 50 C.F.R. 402.14.

16 157. If FWS concludes that the proposed action "will jeopardize the continued  
17 existence" of a listed species, or result in the destruction or "adverse modification" of designated  
18 critical habitat, the biological opinion must outline "reasonable and prudent alternatives." 16  
19 U.S.C. 1536(b)(3)(A).

20 158. If the biological opinion concludes that the action is not likely to jeopardize the  
21 continued existence of a listed species, and will not result in the destruction or adverse  
22 modification of critical habitat, FWS must provide an "incidental take statement," specifying the  
23 amount or extent of such incidental taking on the listed species, any "reasonable and prudent  
24 measures" that FWS considers necessary or appropriate to minimize such impact, and setting  
25

1 forth the "terms and conditions" that must be complied with by the Forest Service to implement  
2 those measures. 16 U.S.C. 1536(b)(4); 50 C.F.R. 402.14(I).

3 159. Alternatively, USFS may enter into "informal consultation" to determine if formal  
4 consultation is required. 50 C.F.R. 402.13.

5 160. If, during informal consultation, it is determined by USFS, with the written  
6 concurrence of the FWS, that the action is not likely to adversely affect listed species or critical  
7 habitat, the consultation process is terminated. Id.

8 161. However, without a biological opinion and an incidental take statement from  
9 FWS, USFS is not authorized to "take" any listed species, nor may it jeopardize the species or  
10 adversely modify critical habitat.

11 162. Accurate, up-to-date, high quality information is essential for the Forest Service's  
12 compliance with the Endangered Species Act. 16 U.S.C. 1536(c)(1).

13 163. The ESA requires review of potential cumulative impacts of projects on  
14 threatened and endangered species, precluding a finding of "will not adversely affect" when  
15 projects collectively "may adversely affect."

16 164. USFS and FWS violated the ESA by failing to initiate formal consultation over  
17 the individual and cumulative adverse effects of the Tatham Project on the northern spotted owl.

18 165. Plaintiff is entitled to recover costs, disbursements and attorney's fees under the  
19 ESA, 16 U.S.C. 1540(g) and/or the Equal Access to Justice Act, 28 U.S.C. 2412.

20 **COUNT V**

21 **(Both Defendants)**

22 **Violation of the Endangered Species Act**

23 **Failure to Reinitiate Consultation for Tatham**

1           166. Plaintiff re-alleges and incorporates the allegations in all preceding paragraphs of  
2 this Complaint herein by reference.

3           167. The ESA required both USFS and FWS to reinitiate consultation "[i]f new  
4 information reveals effects of the action that may affect listed species or critical habitat in a  
5 manner or to an extent not previously considered." 50 C.F.R. 402.16(b).

6           168. Since the completion of consultation and the issuance of USFS's Biological  
7 Assessment and FWS' concurrence letter, new sources of information have revealed likely  
8 effects of the Tatham Project not previously considered:

9           a. The area the FWS analyzed is much smaller than the Tatham project as described  
10 in the Biological Assessment.

11           b. On July 1, 2011, FWS issued a final Revised Recovery Plan for the Owl ("2011  
12 RP"). 76 Fed. Reg. 38575. The 2011 RP requires additional analysis of impacts  
13 from changes to potential prey species, which USFS acknowledges is likely to  
14 occur during a three-year period after the Tatham Project is carried out. The 2011  
15 RP also recognizes "past habitat loss, current habitat loss and competition from  
16 Barred Owls, *Strix varia*, as the most pressing threats to spotted owl persistence."  
17 76 Fed. Reg. 38575. Based on these factors the Recovery Plan recommends  
18 increased habitat protection for the Owl in both occupied and unoccupied areas.  
19 Id. Most importantly, the Recovery Plan cautions that "active management  
20 projects," such as Tatham, "should explicitly evaluate the short-term impacts to  
21 the Northern Spotted Owl and its prey while considering the long-term ecological  
22 benefits of such projects."

23           169. By failing to reinitiate consultation, USFS and FWS have failed to insure the  
24 effects of the Tatham Project will not jeopardize the continued existence of the northern spotted  
25



1 owl or adversely modify its designated critical habitat in violation of the ESA, 16 U.S.C.  
2 1536(a)(2); 50 C.F.R. 402.16(b), and have taken agency action that is arbitrary, capricious, an  
3 abuse of discretion, and otherwise not in accordance with the ESA or the procedures required by  
4 law in violation of APA Sections 706(2)(A) & (D). 5 U.S.C. 706(2)(A) & (D).

5 170. Plaintiff is entitled to recover costs, disbursements and attorney's fees under the  
6 ESA, 16 U.S.C. 1540(g) and/or the Equal Access to Justice Act, 28 U.S.C. 2412.

7 **COUNT VI**

8 **(Both Defendants)**

9 **Failure to Insure Against Jeopardy and the Destruction or**  
10 **Adverse Modification of Critical Habitat – Tatham**

11 171. Plaintiff hereby re-alleges and incorporates all preceding paragraphs.

12 172. Each defendant is required to conduct an independent analysis and make an  
13 independent finding under ESA section 7(a)(2) with regard to the Tatham Project's effect on  
14 designated critical habitat.

15 173. Defendants USFS and FWS violated the ESA by concluding that the Tatham  
16 Project would not adversely affect critical habitat for NSO.

17 174. Both defendants have failed to properly analyze the independent importance of  
18 designated critical habitat and suitable for species survival and recovery purposes.

19 175. In addition, defendants have improperly downplayed the potential impacts of the  
20 Project on NSO critical habitat by considering only the broad-scale, long-term impacts.

21 176. The defendants have failed to properly make this independent inquiry in violation  
22 of ESA 7(a)(2).

23 177. For example:

24 a. As noted above, the USFS relied on the 2008 recovery plan.

- 1           b.     The USFS failed to survey for NSO using the 2011 survey protocol.
- 2           c.     The USFS based its assessment of the percentage of habitat that would be
- 3                 impacted on all habitat rather than the limited NSO "suitable" habitat available to
- 4                 the owl.
- 5           d.     The Environmental Baseline only included impacts since 2000, yet the
- 6                 cumulative effects table documents projects going back to the 1970s.
- 7           e.     There are only 31,982 acres of suitable owl habitat in the action area and 38,032
- 8                 acres have previously been treated, meaning all suitable owl habitat has had
- 9                 repeated entries.
- 10          f.     The USFS only included two additional timber sale projects in the cumulative
- 11                 effects analysis despite there being five – all in the same CHU/LSR; and the FWS
- 12                 failed to consider any of the five projects in its LOC.
- 13          g.     There are currently nine Activity Centers in the project area, all under
- 14                 recommended FWS habitat thresholds, and the project will permit additional
- 15                 timber activities in both the Core Areas and Home Range.
- 16          h.     According to the BA, the Tatham project will degrade 437 acres of N/R habitat;
- 17                 760 acres of foraging habitat; and 2,016 acres of dispersal habitat; however,
- 18                 according to the FWS letter of concurrence the project will only degrade 239
- 19                 acres of N/R habitat; 206 acres of foraging habitat; and 1,040 acres of dispersal
- 20                 habitat. No rationale is provided for the discrepancy in acres affecting CHU.
- 21          i.     The project will also remove at least six acres of habitat for landings, resulting in
- 22                 "long term loss of forested cover"; and will remove about four acres of habitat
- 23                 from road management activities, and 900 acres of fuel breaks.
- 24
- 25

1 j. The BA states that the project could cause the owl to alter its foraging patterns  
2 and temporary displacement could occur – which would constitute "harm"  
3 constituting "take" of the species – yet there is no formal consultation and no take  
4 statement.

5 k. USFS asserts in the BA that removal of habitat from temporary roads and  
6 landings is insignificant; but that conclusion contradicts what FWS stated in the  
7 letter of concurrence; and ignores the impact of the proposed fuel breaks in  
8 nesting habitat.

9 178. The inadequacy of the defendants' consultation under the ESA is arbitrary,  
10 capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. 701-706.

11 179. Plaintiff is entitled to recover costs, disbursements and attorney's fees pursuant to  
12 the ESA, 16 U.S.C. 1540(g) and/or the Equal Access to Justice Act, 28 U.S.C. 2412.

13 **COUNT VII**

14 **(Both Defendants)**

15 **Violation of the Endangered Species Act**

16 **Failure to Use the Best Available Science - Tatham**

17 180. Plaintiff hereby re-alleges and incorporates all preceding paragraphs.

18 181. The defendants have also violated ESA Section 7(a)(2) for failing to use the best  
19 available science regarding the Tatham Project, as alleged herein. 16 U.S.C. 1536(a)(2).

20 182. The inadequacy of the defendants' consultation under the ESA is arbitrary,  
21 capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. 701-706.

22 183. Plaintiff is entitled to recover costs, disbursements and attorney's fees pursuant to  
23 the ESA, 16 U.S.C. 1540(g), and/or the Equal Access to Justice Act, 28 U.S.C. 2412.

24 **COUNT VIII**

25 **(USFS)**

1 **Violation of the Endangered Species Act**

2 **Irreversible or Irretrievable Commitment of Resources - Tatham**

3 184. Plaintiff hereby re-alleges and incorporates all preceding paragraphs.

4 185. Section 7(d) of the ESA prohibits defendant USFS from making "any irreversible  
5 or irretrievable commitment of resources with respect to the agency action which has the effect  
6 of foreclosing the formulation or implementation of any reasonable and prudent alternative  
7 measures" during the consultation process. 16 U.S.C. 1536(d).

8 186. By approving the Tatham Project without initiating formal consultation,  
9 defendant USFS is violating Section 7(d) of the ESA.

10 187. This ESA violation is arbitrary, capricious, an abuse of discretion, and not in  
11 accordance with law. 5 U.S.C. 701-706.

12 188. Plaintiff is entitled to recover costs, disbursements and attorney's fees pursuant to  
13 the ESA, 16 U.S.C. 1540(g), and/or the Equal Access to Justice Act, 28 U.S.C. 2412.

14 **COUNT IX**

15 **(USFS)**

16 **Violation of the Endangered Species Act**

17 **Prohibited Taking of Listed Species - Tatham**

18 189. Plaintiff hereby re-alleges and incorporates all preceding paragraphs.

19 190. The ESA prohibits "take" of species listed as endangered. 16 U.S.C. 1538.

20 191. The FWS has extended the take prohibition to threatened species through  
21 regulation. 50 C.F.R. 17.31(a).

22 192. "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or  
23 collect, or to attempt to engage in any such conduct. 16 U.S.C. 1532(19).

24 193. The Tatham Project will log habitat of the owl, which constitutes "harm" and  
25 "harassment" within the ESA's take definition.

1 194. Defendant USFS's consultation with FWS was inadequate, as alleged herein; and  
2 because defendant USFS has not initiated formal consultation, and obtained a biological opinion  
3 and incidental take statement for the implementation of the Project and ongoing adverse effects  
4 to listed species, no take of the NSO is properly authorized.

5 195. Therefore, defendant USFS is in violation of Section 9 of the ESA.

6 196. Plaintiff is entitled to recover costs, disbursements and attorney's fees pursuant to  
7 the ESA, 16 U.S.C. 1540(g), and/or the Equal Access to Justice Act, 28 U.S.C. 2412.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, plaintiffs respectfully request that this Court:

10 1. Declare that the defendants violated the National Environmental Policy Act and the  
11 Administrative Procedure Act, and their implementing regulations, in approving the three  
12 projects.

13 2. Declare that the Forest Service violated the Endangered Species Act and the  
14 Administrative Procedure Act, and their implementing regulations, 1) in approving the Tatham  
15 Project and 2) in the consultation process for NSO.

16 3. Declare that the FWS violated the Endangered Species Act and its implementing  
17 regulations, 1) in approving the Tatham Project and 2) in the consultation process for NSO.

18 4. Declare that the Decision Memo for the three projects are insufficient as a matter of  
19 law.

20 5. Declare that the consultation process for NSO for the Tatham Project is insufficient  
21 as a matter of law.

22 6. Enjoin defendant USFS from undertaking any activities related to the three projects,  
23 unless and until defendants have complied with NEPA and the APA.

24 7. Enjoin defendant USFS from undertaking any activities related to the Tatham Timber  
25 Sale, unless and until defendants have complied with the ESA.

26 8. Award plaintiff its reasonable attorney's fees and costs incurred in this action pursuant  
27 to the Equal Access to Justice Act, 28 U.S.C. 2412 and/or 16 U.S.C. 1540(g).

1 9. Grant plaintiff such additional relief as the Court deems just and equitable.

2 Respectfully submitted September 24, 2012.

3  
4 /s/ James Jay Tutchton

5 James Jay Tutchton (CA State Bar # 150908)

6 Tutchton Law Office

7 6439 E. Maplewood Ave.

8 Centennial, CO 80111

9 (720) 301-3843

10 E-mail: jtutchtontlo@gmail.com