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20 **UNITED STATES DISTRICT COURT**
21
22 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
23

24 **WISHTOYO FOUNDATION, DELIA) Case No. 2:19-cv-3322**
25 **DOMINGUEZ, and CENTER FOR)**
26 **BIOLOGICAL DIVERSITY)**
27)

28 Plaintiffs,)

v.)

UNITED STATES FISH AND) COMPLAINT FOR
WILDLIFE SERVICE,) DECLARATORY AND
) INJUNCTIVE RELIEF
)

Defendant.)

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1 **INTRODUCTION**

2 1. The California condor is one of the most imperiled animals on the planet.
3 After four decades of protection as an endangered species, an unprecedented captive
4 breeding program, implementation of California legislation banning lead bullets, and
5 continued feeding and management efforts, California condors are mounting a gradual
6 recovery, but remain critically endangered in 2019.

7 2. The condor’s decline has had a marked impact on native peoples in central
8 California, in particular the Kitanemuk and Yowlumne Tejon and Chumash—tribes with
9 ancestral lands in the condor’s historical range. The condor is of tremendous religious
10 and cultural significance to these tribes and the decline of the species has contributed to
11 their inability to perform essential religious ceremonies and cultural practices.

12 3. The condor now faces a threat from the very agency tasked with protecting
13 it—the U.S. Fish and Wildlife Service (the “Service”). In 2013, the Service approved
14 the Tehachapi Uplands Multiple Species Habitat Conservation Plan (“TUMSHCP”),
15 which authorizes large-scale development on thousands of acres that the Service
16 previously designated as critical habitat for the condor at Tejon Ranch in Kern County,
17 California. In connection with its approval of the TUMSHCP, the Service issued an
18 Incidental Take Permit (“ITP”) allowing the “taking” of California condors under the
19 Endangered Species Act. The ITP was the first permit of its kind that allows the taking
20 of condors.

21 4. In this action, Plaintiffs Wishtoyo Foundation, Delia Dominguez, and
22 Center for Biological Diversity challenge the Service’s approval of the TUMSHCP
23 based on the Service’s erroneous conclusion that California condors are not “Traditional
24 Cultural Properties” under the National Historic Preservation Act (“NHPA”), 16 U.S.C.
25 § 479(f); 16 U.S.C. 470 § 101; 36 C.F.R. 800.4-800.6. This determination resulted in an
26 inadequate consultation process with native persons under the NHPA. The Service’s
27 action was arbitrary and capricious, an abuse of discretion, otherwise not in accordance
28 with law, and without observance of procedures required by law within the meaning of

1 the Administrative Procedures Act (“APA”), 5 U.S.C. § 701 et seq.

2 5. Plaintiffs seek declaratory relief that the Service has violated the NHPA and
3 APA. Furthermore, Plaintiffs seek injunctive relief setting aside and vacating the
4 Service’s approval of the TUMSHCP and ITP, and enjoining issuance of subsequent
5 permits and authorizations related to the TUMSHCP.

6 **JURISDICTION AND VENUE**

7 6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331
8 (federal question), 28 U.S.C. § 1346 (United States as a defendant), and 5 U.S.C. §§
9 701-706 (Administrative Procedure Act).

10 7. This Court has authority to grant the requested relief pursuant to 28 U.S.C.
11 §§ 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706
12 (Administrative Procedure Act).

13 8. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e). Plaintiffs
14 Wishtoyo Foundation and Delia Dominguez reside within this district, the Service
15 maintains its Ventura office in this judicial district, and a substantial part of the events or
16 omissions giving rise to Plaintiffs’ claims occurred within this district.

17 **PARTIES**

18 9. Plaintiff WISHTOYO FOUNDATION, doing business as Wishtoyo
19 Chumash Foundation (“Wishtoyo” or “Wishtoyo Chumash Foundation”), is a nonprofit
20 organization incorporated under the laws of the State of California, and with its principal
21 place of business in unincorporated Ventura County, California. Wishtoyo Chumash
22 Foundation has over 700 members composed primarily of Chumash people, Ventura
23 County residents, Santa Barbara County residents, and Los Angeles County residents.
24 Wishtoyo’s mission is to preserve, protect, and restore Chumash heritage, the culture of
25 all indigenous communities, and the environment. Wishtoyo shares traditional Chumash
26 beliefs, cultural practices, songs, dances, stories, and values with the public to instill
27 environmental awareness and responsibility for sustaining the health of our land, air, and
28 water for the benefit of future generations. Wishtoyo Chumash Foundation brings this

1 action on behalf of itself and its adversely affected members and staff.

2 10. The Chumash people and Wishtoyo have a strong cultural interest in the
3 recovery of the California condor and the protection of the area now known as Tejon
4 Ranch. As evidenced by condor pictographs, condor ceremonies, and condor dances, the
5 Chumash people have a long history of interacting with the California condor for many
6 reasons, including religious and ceremonial purposes. For over 10,000 years, the
7 Chumash people have resided in villages, conducted ceremonies at sacred sites, and
8 buried their dead in and around the area covered by the TUMSHCP. The cultural and
9 religious practices of the Chumash People, especially those involving the condor, are
10 threatened by the Service's action.

11 11. Plaintiff DELIA DOMINGUEZ, an individual, is a retired federal employee
12 and the Chairperson of the Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon
13 Indians, a California Indian Tribe. Ms. Dominguez was born and raised in Bakersfield,
14 California, as was her mother Rebecca Martinez Reyes. Ms. Dominguez's grandmother
15 Petra Olivas Gamez Martinez was the last of many of her ancestors to be born on the
16 Rancho El Tejon, and was part of the first generation to be forced off these lands. Ms.
17 Dominguez resides in Bakersfield and Covina, California, splitting her time equally
18 between these residences. Her home on the outskirts of southeast Bakersfield, which she
19 has maintained since her birth, is part of a neighborhood where many Tejon Indians
20 resided who would travel to Rancho El Tejon to visit their remaining family members.

21 12. Ms. Dominguez is a designated Native American Heritage Commission
22 Most Likely Descendant of the Kitanemuk and Yowlumne Tejon Indians of the Tejon
23 Ranch area. The Kitanemuk and Yowlumne Tejon Indians were early residents of the
24 Tehachapi Mountains and the Antelope Valley, including the lands covered by the
25 TUMSHCP, living in long-established settlements before being forcibly removed from
26 Tejon Ranch. The condor holds tremendous religious and cultural significance for the
27 Kitanemuk and Yowlumne Tejon Indians and to Ms. Dominguez. Ms. Dominguez's
28 cultural and religious practices as a Kitanemuk and Yowlumne Tejon Indian, especially

1 those involving the condor, are threatened by the Service's action. Ms. Dominguez also
2 values the existence of condors in the wild, as well as intact condor habitat, for their own
3 sake.

4 13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the "Center") is a
5 nonprofit, public interest environmental organization incorporated under the laws of the
6 State of California. The Center has about 69,000 members, including residents of parts
7 of northern Los Angeles and southern Kern counties in the vicinity of the area covered
8 by the TUMSHCP. The Center is dedicated to the protection of native species and their
9 habitats through science, policy, and environmental law. The Center has worked for
10 many years to protect imperiled plants and wildlife, open space, air and water quality,
11 and the overall quality of life for people in the Tehachapi Mountains region. The Center
12 brings this action on behalf of itself and its adversely affected members, staff, and
13 directors.

14 14. The Center's members and staff regularly use, and will continue to use,
15 lands in and around the Tehachapi Mountains for observation, research, aesthetic
16 enjoyment, and other recreational, scientific, and educational activities. The Center's
17 members and staff have and continue to research, study, observe, and seek protections
18 for the California condor and other sensitive species found in the project area. The
19 Center's members, staff, and directors derive cultural, scientific, recreational,
20 conservation, and aesthetic benefits from the condor's existence in the wild.
21 Defendants' violations of law have threatened a further decline of California condor
22 populations and degradation of habitat occupied by the species, harming the Center's
23 and its members' interests in the condor and its habitat.

24 15. Defendant the UNITED STATES FISH AND WILDLIFE SERVICE is the
25 federal agency within the Department of Interior charged with responsibility for
26 conserving endangered and threatened species under the Endangered Species Act
27 ("ESA"), for enforcing and implementing the ESA, and for complying with the NHPA in
28 connection with the Service's ESA actions.

STATUTORY FRAMEWORK

ENDANGERED SPECIES ACT

16. The ESA “provide[s] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). To achieve species conservation, the ESA requires the “use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” *Id.* § 1532(3). The ESA’s goal is thus to recover endangered species.

17. To receive the protection that the ESA affords, the Service (which administers the ESA for non-marine species) must first list a species as “endangered” or “threatened.” 16 U.S.C. § 1533. A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

18. The ESA also provides for the designation of critical habitat for endangered and threatened species—the areas occupied by a species at the time of listing that contain the physical or biological features essential to the conservation of the species, or unoccupied areas that the Service determines are essential for the conservation of the species. 16 U.S.C. § 1533(b)(2); 16 U.S.C. § 1532(5)(A).

19. The ESA prohibits the unpermitted “taking” of endangered wildlife. “Take” is broadly defined as harming, harassing, trapping, capturing, wounding, or killing a listed species either directly or by habitat degradation. 16 U.S.C. § 1532(19). The prohibition also applies to the acts of third parties whose acts bring about the taking. 16 U.S.C. § 1538(g).

20. Section 10 of the ESA provides one exception to the take prohibition for non-federal activities. 16 U.S.C. § 1539. This provision allows the Service to issue an Incidental Take Permit (“ITP”) that allows a person to legally proceed with an activity that would otherwise result in the illegal take of a listed species upon the Service’s

1 approval of a Habitat Conservation Plan (“HCP”) and finding that “such taking is
2 incidental to and not the purpose of the carrying out of any otherwise lawful activity.” 16
3 U.S.C. § 1539(a)(1)(B).

4 21. An HCP must contain specific measures to “conserve,” or provide for the
5 recovery of, the species. At a minimum, the ESA and implementing regulations require
6 all HCPs to include the following: (1) a complete description of the activity sought to be
7 authorized; (2) names of the species sought to be covered by the permit, including the
8 number, age and sex of the species, if known; (3) the impact which will likely result
9 from such taking; (4) what steps the applicant will take to monitor, minimize, and
10 mitigate those impacts; (5) the funding that will be available to implement such
11 monitoring, minimization, and mitigation activities; (6) the procedures to be used to deal
12 with unforeseen circumstances; and (7) what alternative actions to such taking the
13 applicant considered and the reasons why such alternatives are not being utilized. 16
14 U.S.C. § 1539(a)(2)(A)(i)-(iv); 50 C.F.R. §§ 17.22, 17.32. The Service cannot issue an
15 ITP if the HCP does not contain this information. 16 U.S.C. § 1539(a)(2)(A).

16 22. Upon reviewing an HCP and before permit issuance, the Service must find
17 that (i) the taking will be incidental; (ii) the applicant will, to the maximum extent
18 practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will
19 ensure that adequate funding for the plan will be provided; (iv) the taking will not
20 appreciably reduce the likelihood of the survival and recovery of the species in the wild;
21 and (v) any other measures the Service requires will be met. 16 U.S.C. § 1539(a)(2)(B);
22 50 C.F.R. §§ 17.22, 17.32.

23 23. Pursuant to Section 7 of the ESA, for any action “authorized, funded, or
24 carried out” by a federal agency, that agency shall consult with the Service to insure that
25 such action “is not likely to jeopardize the continued existence of any endangered
26 species or threatened species or result in the destruction or adverse modification of
27 [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). Where the Service is the
28 action agency, it is required to consult with itself.

1 24. As part of the ESA Section 7 consultation process, the Service makes a
2 determination, through the preparation of a biological opinion as to whether or not the
3 Service believes the proposed action is likely to jeopardize the continued existence of a
4 listed species or is likely to adversely modify the species' critical habitat. A biological
5 opinion must include a summary of the information on which it is based, must
6 adequately detail and assess how the action affects listed species and their critical
7 habitats, and must be based "best scientific and commercial data available." 16 U.S.C. §
8 1536(a)(2)-(b)(3); 50 C.F.R. §402.14(d). This includes an evaluation of the "cumulative
9 effects on the listed species." 50 C.F.R. § 402.14(g)(3).

10 ***THE NATIONAL HISTORIC PRESERVATION ACT***

11 25. Congress enacted the NHPA, 16 U.S.C. § 470 *et seq.*, in 1966 with the
12 express intent that "the historical and cultural foundations of the Nation should be
13 preserved as a living part of our community life and development in order to give a
14 sense of orientation to the American people." 16 U.S.C. § 470(b)(2).

15 26. Section 106 of the NHPA requires federal agencies involved in an
16 "undertaking," which includes projects requiring a federal permit, to "take into account
17 the effect of the undertaking on any district, site, building, structure, or object that is
18 included in *or eligible for* inclusion in the National Register [of Historic Places] ." 16
19 U.S.C. § 470f (emphasis added).

20 27. The NHPA is designed to ensure that federal decision-makers thoroughly
21 evaluate and address the impacts of their proposed actions on historic properties prior to
22 taking final action.

23 28. The NHPA Section 106 process requires federal agencies involved in
24 undertakings to make a reasonable and good faith effort to identify and disclose historic
25 properties within affected areas, evaluate the potential adverse effects of the federal
26 undertaking to the historic properties, and seek ways to avoid, minimize, or mitigate any
27 adverse effects to the historic properties. 36 C.F.R. §§ 800.4-800.6. Throughout all
28 stages of the Section 106 process, the applicable federal agency must consult with Indian

1 tribes that attach religious and cultural significance to historic properties within the
2 affected area that may be affected by an undertaking, even if such an area is outside of a
3 Tribe's Reservation Boundaries. Such areas are referred to as Traditional Cultural
4 Properties. *Id.* §§ 800.2(c)(2)(ii)(iii), 800.3(f)(2), 800.4(a)(4), 800.5(c)(2)(iii), 800.6(a),
5 800.6(b)(2).

6 29. The NHPA and its implementing regulations provide that “[c]onsultation
7 [with Indian tribes] should commence early in the planning process, in order to identify
8 and discuss relevant preservation issues” 36 C.F.R. § 800.2(c)(2)(ii)(A). Federal
9 agencies “shall make a reasonable and good faith effort to identify any Indian tribes . . .
10 that might attach religious and cultural significance to historic properties in the area of
11 potential effects and invite them to be consulting parties.” 36 C.F.R. § 800.3(f)(2).
12 Consultation with a tribe “must recognize the government-to-government relationship
13 between the federal government and Indian tribes.” *Id.*, § 800.2(c)(2)(ii)(C). In the
14 consultation process, federal agencies must provide the tribe with “a reasonable
15 opportunity to identify its concerns about historic properties, advise on the identification
16 and evaluation of historic properties, including those of traditional religious and cultural
17 importance, articulate its views on the undertaking's effects on such properties, and
18 participate in the resolution of adverse effects.” *Id.*, § 800.5(c)(2)(ii)(A).

19 ***ADMINISTRATIVE PROCEDURE ACT***

20 30. The Administrative Procedures Act (“APA”), 5 U.S.C. §§ 701-706,
21 provides for judicial review of final agency action.

22 31. Under the authority of the APA, a reviewing court must hold unlawful and
23 set aside agency action, findings, and conclusions found to be arbitrary, capricious, an
24 abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A). A
25 reviewing court must also set aside agency action, findings, and conclusions found to be
26 without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

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1 **FACTUAL AND PROCEDURAL ALLEGATIONS**

2 ***THE CALIFORNIA CONDOR***

3 32. The California condor (*Gymnogyps californianus*) is the largest bird in
4 North America, weighing as much as twenty-five pounds, standing as tall as four and a
5 half feet, and soaring on wings more than nine feet wide. These majestic birds once
6 dominated Western skies from Canada to Mexico, from the Pacific coast as far inland as
7 Utah, but their range has been greatly reduced to parts of Central and Southern
8 California, with experimental, reintroduced population in northern Arizona/southern
9 Utah and Baja California.

10 33. Condors are obligate scavengers, meaning they feed only on carrion—
11 carcasses of animals—and do not hunt. Condors prefer the carcasses of large mammals
12 such as deer and whales, but are also known to eat the carcasses of smaller animals such
13 as California ground squirrels.

14 34. California condors live in rocky, forested regions including canyons, gorges
15 and mountains. Condors soar on wind currents to heights of up to 15,000 feet and travel
16 up to 150 miles a day in search of food, searching for carcasses by sight, not smell.

17 35. Habitat loss and destruction, hunting, lead poisoning, decrease in food
18 source, the capturing of live birds and eggs, collisions with power lines and wind
19 turbines, and other human-caused assaults have decimated the species. When wild
20 California condors populations were first measured in 1968, only 50-60 birds remained.

21 36. The California condor was listed as endangered under the 1966 Endangered
22 Species Preservation Act—the precursor to the ESA—in 1966. 80 Stat. 926, 926-930,
23 P.L. 89-669, Oct 15, 1966. The next year, the Secretary of the Interior approved the first
24 list of endangered species and the California condor was among the first 78 species
25 listed as endangered. 32 Fed. Reg. 4001.

26 37. In 1973, the ESA replaced the Endangered Species Preservation Act.
27 Species listed under the prior act, including the California condor, were grandfathered in
28 as listed species under the ESA. Despite the listing of the condor as endangered, by

1 1982 there were only 22 California condors left in the wild.

2 38. In 1982, fearing the condor's imminent extinction, the Service began
3 capturing all wild condors. Upon the removal of the last condor, the species became
4 extinct in the wild. A captive breeding program began shortly thereafter with the first
5 birds being released back into the wild in 1992.

6 39. With the captive breeding and reintroduction program, condor numbers
7 have slowly increased. As of December 2017, there were 290 California condors in the
8 wild, including 90 in Central California, 80 in Southern California, 82 in northern
9 Arizona and southern Utah, and 38 in Baja California. An additional 173 condors were
10 in captivity.

11 40. The condor's gradual recovery has required significant and ongoing human
12 intervention and management, including the repeated recapture of condors for treatment
13 for lead poisoning and the continued release of captive-born birds.

14 41. California condors are fully-protected birds under California law (Cal. Fish
15 & Game Code § 3511(b)(5)), and may not be taken at any time except for certain narrow
16 exceptions such as for "necessary scientific research, including efforts to recover fully
17 protected, threatened, or endangered species" (*id.* at §3511(a)(1)), or if take is authorized
18 under an approved Natural Communities Conservation Plan ("NCCP") (*id.*; *see* Fish &
19 Game Code § 2835.) There is no approved NCCP that would cover take of condor for
20 any of the Tejon Ranch activities.

21 42. California condors continue to die of lead poisoning from feeding on the
22 carcasses of animals contaminated with the lead fragments of hunters' bullets and shot,
23 although state legislation banning the use of lead bullets in the California counties home
24 to critical habitat has reduced condor mortality. Between 1992 to 2012, 123 condors
25 died of lead poisoning. In 2013, at least 10 condors died of lead poisoning and 57 were
26 treated for lead toxicosis. In 2016, one condor died was confirmed dead from lead
27 poisoning, and 15 were treated.

28 43. In 1976, the Service designated 570,400 acres as critical habitat for the

1 condor. 41 Fed. Reg. 41914 (September 24, 1976.) The designation created nine
2 geographically distinct critical habitat units spread throughout the condor’s “U” shaped
3 range at the base of California’s Central Valley. One of these units—the Tejon Ranch
4 Critical Habitat Unit (“Tejon Ranch Unit”)—covers 134,871 acres of Tejon Ranch’s
5 270,365 “land, water, and airspace” acres. 41 Fed. Reg. 41914 (amended with no
6 changes in 42 Fed. Reg. 47840-45). The critical habitat designation identified the Tejon
7 Ranch Unit as “critical for feeding and related activities” and further explained that the
8 unit “is very important because it contains the only significant feeding habitat remaining
9 in close proximity to the Sespe-Piru Condor nesting area.” 41 Fed. Reg. 41914.

10 44. The California condor holds great religious and cultural significance to
11 tribes with ancestral lands within and adjacent to Tejon Ranch, in particular the
12 Chumash and the Kitanemuk and Yowlumne Tejon Indians. Like the status of the bald
13 eagle in other indigenous cultures, the practice of the Chumash and the Kitanemuk and
14 Yowlumne Tejon Indians religions, cultural traditions, connection to their ancestors, and
15 cultural ceremonies requires access to and seeing the California condors in specific
16 locations and sacred sites, including at ancestral burial sites. Both the Chumash and the
17 Kitanemuk and Yowlumne Tejon Indians, in continuation of the traditional cultural and
18 religious practices of their ancestors, honor the condor through ceremonial dance, other
19 ceremonial and cultural practices, and through oral history. Due to the precipitous
20 decline of the species, practitioners have had difficulty collecting condor feathers for use
21 in condor dances, and other sacred religious ceremonies and cultural practices, including
22 those connecting them to their ancestors. The condor and condor habitat play a vital
23 role in these communities’ historically-rooted beliefs, customs, and practices and, as
24 such, are Traditional Cultural Properties.

25 45. The presence of the condor and condor habitat on, around, and over the
26 lands covered by the TUMSHCP, which include Chumash and Kitanemuk and
27 Yowlumne Tejon Indians’ current and traditional territories, burial sites, and sacred
28 cultural and religious landscapes and viewsapes, allows and is necessary for these tribes

1 to connect with their ancestors, is necessary for these tribal members to continue
2 honoring and connecting with the condor in ceremonies and traditions, and is necessary
3 for these tribes' cultural and ceremonial use of sacred sites which are dependent on the
4 condor's presence on the sites or flying overhead.

5 ***TEJON RANCH***

6 46. The area now known as Tejon Ranch is located in Kern and Los Angeles
7 counties, in and around the Tehachapi Mountains of California. Tejon Ranch contains a
8 great diversity of landforms, topography, habitats, wildlife, and plant communities. In
9 addition to the California condor, Tejon Ranch provides habitat for the endangered
10 southwestern willow flycatcher (*Empidonax traillii extimus*), the endangered least Bell's
11 vireo (*Vireo bellii pusillus*), the threatened western yellow-billed cuckoo (*Coccyzus*
12 *americanus occidentalis*), and several other species that are not protected under the ESA
13 but are "covered" species under the TUMSHCP.

14 47. Prior to the arrival of non-native peoples, the region is known to have been
15 occupied by numerous Native American tribes such as the Kitanemuk, Yowlumne
16 Yokuts, Tulamni Yokuts, Hometwoli Yokuts, Interior Chumash, Tataviam, and
17 Kawaiisu tribes, and was a travel and trade route for a multitude of coastal Chumash
18 tribes, bands, and clans that occupied areas in the region when coming through.

19 48. The Chumash people resided in villages, conducted ceremonies and cultural
20 practices at sacred sites, and buried their dead in and around the present Tejon Ranch
21 area for over 10,000 years. The Kitanemuk and Yowlumne Tejon Indians were likewise
22 early residents of the Tehachapi Mountains and the Antelope Valley, including the lands
23 covered by the TUMSHCP.

24 49. During the California gold rush, United States officials tasked Lieutenant
25 Edward Fitzgerald Beale with removing native people from their land to facilitate the
26 arrival of settlers into the area. In 1851, a temporary camp was set up at Tejon Pass for
27 the execution of a treaty with native peoples in the region, known as Treaty D. Lt. Beale
28 brought in tribal representatives from the region, including the Tejon Ranch, Lake

1 Isabella, Castec, Rancho San Emigdio, Buena Vista Lake, Kern Lake, Kern River, and
2 Grapevine areas, to agree under the treaty to vacate the majority of the mountainous
3 inland tribal homelands in exchange for the promise of goods, annuities, and reservation
4 land in the Central Valley. In 1852, Lt. Beale established a reservation for all those
5 native people represented as signatory parties to Treaty D, including those originally
6 from the Tejon Ranch lands, further facilitating the removal of the historic occupants of
7 the Tejon Ranch. The reservation was named the Sebastian Indian Reservation after
8 William King Sebastian, then chairman of the Senate Committee on Indian Affairs.
9 Treaty D, also known as the Tejon Treaty, was never ratified, yet the land was not
10 returned, the reservation was soon returned to private, non-tribal ownership, and the
11 reservation occupants were again forced to leave.

12 50. In 1858, the Lands Commission ratified claims to Tejon Ranch land based
13 upon earlier Mexican land grants. The tribes were stripped of their rights to the
14 Sebastian Reservation and again displaced. Beale bought numerous parcels from those
15 declared to be owners by the Lands Commission until he owned the whole of what is
16 now know as Tejon Ranch. He began ranching the land in the late 1800s and continued
17 to expel the native inhabitants who had been deprived of their rightful ancestral land
18 through his political maneuvering.

19 51. In 1912, a group of businessmen purchased Tejon Ranch. In 1936, ranch
20 ownership was transferred to the Tejon Ranch Co. The Tejon Ranch Co. is now
21 operated as Delaware corporation, publically traded on the New York Stock Exchange.
22 The Tejon Ranchcorp, a wholly owned subsidiary of the Tejon Ranch Co. and a
23 California corporation, holds title to the Tejon Ranch lands with the exception of the
24 lands comprising the Tejon Industrial Complex.

25 52. In February 2003, the adult condor known as AC-8 was shot and killed on
26 Tejon Ranch lands during a hunt authorized by Tejon Ranch Co. AC-8 was first
27 observed in the 1960s nesting within Tejon Ranch, was one of the last remaining
28 condors born in the wild prior to 1982, and was the first of the wild-born condors to be

1 re-released to the wild in 2000. The Service considered AC-8 to be a mentor bird for
2 captive-raised condors that had been released. Plaintiff Delia Dominguez attended the
3 federal court hearing for the hunter who shot AC-8, and sought the release of AC-8's
4 remains to the Kitanemuk and Yowlumne Tejon Indians for the use of AC-8's feathers
5 in traditional religious and cultural ceremonies and regalia, for sharing with other tribes
6 for use in traditional religious and cultural ceremonies and regalia, and to provide the
7 condor with a ceremonial burial. While AC-8's remains were ultimately turned over to a
8 federally-recognized tribe, the Kitanemuk and Yowlumne Tejon Indians were qualified
9 to receive the remains based on the Tribe's special connection to the condor rooted in
10 religious and cultural practices.

11 53. Tejon Ranch remains vital to the Southern California condor population due
12 to several unique characteristics, demonstrated by the fact that most of the condors in
13 Southern California have been documented foraging (searching for food and feeding) at
14 the Tejon Ranch Unit. Livestock grazing operations, native ungulates, and the hunting
15 of non-native game species provides an abundant food supply. The condors are able to
16 ride the area's strong and reliable winds to travel the long distances required to visually
17 locate carcasses and, the area's abundance of other scavengers, including vultures and
18 eagles, helps the condors forage. The area's long history of isolation has kept it largely
19 free from detrimental human influences associated with urbanization making suitable
20 overnight roosting locations and foraging grounds especially attractive to condors.
21 Accordingly, the Tejon Ranch Unit demonstrates very high levels of condor activity.

22 54. The Tejon Ranch Unit has become even more critical to the survival and
23 recovery of the California condor as urban development, oil and gas extraction, farming,
24 and wind energy development elsewhere have transformed formerly suitable foraging
25 habitat into areas that may not be compatible with California condor recovery.

26 ***THE TUMSHCP AND TEJON MOUNTAIN VILLAGE***

27 55. In 1997, the Tejon Ranch Co. filed a lawsuit against the Service seeking to
28 halt the release of California condors near Tejon Ranch and to have any released condors

1 in California be classified as an experimental population under ESA Section 10(j). In or
2 around 2002, the Service and Tejon Ranch Co. began negotiating the agreement that
3 culminated in the TUMSHCP. Under the terms of this deal, which remained under seal
4 until 2009, Tejon Ranch Co. dismissed this lawsuit in 2014 based on the Service's 2013
5 approval of the TUMSHCP and issuance of the ITP in a form acceptable to the Tejon
6 Ranch Co.

7 56. In 2005, Tejon Ranch Co., with the Service's technical assistance, began
8 drafting the TUMSHCP in an effort to obtain an ITP for a variety of protected species
9 for the "covered lands"—141,886 of Tejon Ranch's 270,365 acres. The covered lands
10 include Tejon Ranch Co.'s Tejon Mountain Village luxury resort residential and
11 commercial development project, which would result in 5,533 acres of permanent
12 ground disturbance and up to an additional 1,773 acres of vegetation clearing within a
13 total development envelope of 8,817 acres.

14 57. Tejon Mountain Village anticipated buildout would include up to 3,450
15 residences, 160,000 square feet of commercial development, 750 hotel rooms, and
16 350,000 square feet of support uses as well as two golf courses and an equestrian center.
17 Kern County approved a specific plan for Tejon Mountain Village in 2009, but
18 development has not commenced.

19 58. The Service released the draft TUMSHCP, draft environmental impact
20 statement, and the proposed implementation agreement for the plan in February 2009.
21 74 Fed. Reg. 6050. In January 2012, the Service released a supplemental environmental
22 impact statement for the plan. Plaintiffs submitted written comments on the TUMSHCP,
23 environmental impact statement, and supplemental environmental impact statement.

24 59. In 2012, the Service contacted a dozen tribes and tribal representatives,
25 including Plaintiff Delia Dominguez, who the Service believed had an interest in the
26 TUMSHCP and the project area, "to ensure that the relevant Native American
27 community had been given the opportunity to consult on the most current description of
28 the undertaking," and to identify Traditional Cultural Properties that may occur in the

1 project area. Although commenters, including Plaintiffs, identified the condor and
2 condor habitat as Traditional Cultural Properties that should be included in the scope of
3 the Service's NHPA consultation, the Service refused to recognize condors or condor
4 habitat as Traditional Cultural Properties and therefore did not consult with tribes or
5 tribal representatives on the TUMSHCP's effects on condors, condor habitat, or the
6 resulting effects on Traditional Tribal Cultural Properties, tribal cultural practices, tribal
7 ceremonial practices, and tribal religious practices..

8 60. On April 26, 2013, the Service issued its final Biological Opinion for the
9 TUMSHCP. The Biological Opinion concluded that, although condors currently use and
10 are likely to continue to use the Tejon Ranch Unit, the proposed activities on covered
11 lands within Tejon Ranch were not likely to jeopardize the existence or recovery of the
12 California condor. The Service also concluded that the Tejon Mountain Village
13 development was not likely to destroy or adversely modify the condor's critical habitat,
14 despite the project's permanent elimination or modification of thousands of acres of
15 designated critical habitat. Development pursuant to the TUMSHCP will result in the
16 direct and indirect modification of approximately 12,000 acres of condor foraging
17 habitat within the Tejon Ranch Unit.

18 61. On April 29, 2013, the Service released its final Record of Decision for the
19 TUMSHCP environmental impact statement and issued Tejon Ranch Co. a 50-year,
20 renewable ITP for "approximately 145,000 acres of Tejon Ranchcorp lands in Kern
21 County, California." The ITP authorized incidental take of four California condors as
22 well as 12 other species associated with the proposed activities.

23 **CLAIM FOR RELIEF**

24 **Violation of the NHPA**

25 62. Plaintiffs hereby re-allege and incorporate by reference each and every
26 allegation set forth in this Complaint as if set forth in full herein.

27 63. The Service violated the NHPA when it approved the TUMSHCP, issued
28 the ITP, and issued the Record of Decision without taking into account, evaluating, or

1 attempting to mitigate the effects of these approvals on the California condor; condor
2 nests; tribal cultural and tribal sacred landscapes, sites, burial grounds, and viewsapes,
3 of which the cultural and religious function and significance to tribes are dependent on
4 the presence of the condor; and/or condor habitat as Traditional Cultural Properties. 16
5 U.S.C. § 479(f); 16 U.S.C. 470 § 101; 36 C.F.R. 800.4-800.6.

6 64. The Service's conclusion that the California condor; condor nests; tribal
7 cultural and tribal sacred landscapes, sites, burial grounds, and viewsapes, of which the
8 cultural and religious function and significance to tribes are dependent on the presence
9 of the condor; and condor habitat are not Traditional Cultural Properties was arbitrary,
10 capricious, and not in accordance with law as required by NHPA.

11 65. The Service's failure to consult with tribes and tribal representatives
12 regarding the effect of the TUMSHCP on the California condor; condor nests; tribal
13 cultural and tribal sacred landscapes, sites, burial grounds, and viewsapes, of which the
14 cultural and religious function and significance to tribes are dependent on the presence
15 of the condor; and/or condor habitat was arbitrary, capricious, and not in accordance
16 with law as required by NHPA, and represents agency action unlawfully withheld in
17 violation of the APA.

18 66. The Service failed to adequately identify and analyze other historic and
19 cultural resources within the TUMSHCP area that are at risk due to the Tejon Mountain
20 Village project despite the fact that the Service was aware of the details of at least 58
21 separate areas containing such resources. Plaintiffs informed the Service of the State of
22 California's comprehensive, three phase archaeological survey prepared as part of the
23 California Environmental Quality Act review process for Tejon Mountain Village. That
24 survey identified 58 distinct places of historic and cultural value, the majority which
25 were places significant to the local Native American tribes, including the Chumash and
26 Kitanemuk and Yowlumne Tejon Indians. Among these known areas were sacred sites
27 and burial grounds. The Service knowingly and intentionally violated the NHPA when
28 it failed to adequately identify and analyze the historic and cultural resources that it was

1 aware of within the TUMSHCP area.

2 67. For each of the above reasons, and others, the Service's approval of the
3 TUMSHCP, ITP, and Record of Decision is arbitrary, capricious, and not in accordance
4 with law as required by NHPA, its implementing regulations, and the APA, and is
5 subject to judicial review thereunder. 5 U.S.C. §§ 701-706.

6 **PRAYER FOR RELIEF**

7 Plaintiffs request that this Court enter judgment providing the following relief:

- 8 1. A judgment declaring that the Service violated the NHPA due to its
9 failure to conduct the NHPA's required consultation on Traditional
10 Cultural Properties and failure to seek ways to avoid, minimize, or
11 mitigate adverse effects to such properties, and that such failure is
12 arbitrary, capricious, and not in accordance with procedures required
13 by law pursuant to the APA, 5 U.S.C. §§ 701-706;
- 14 2. A judgment declaring that the Service's approvals of the Tehachapi
15 Uplands Multiple Species Habitat Conservation Plan, Biological
16 Opinion, Incidental Take Permit, and Record of Decision are
17 unlawful based on the Service's violation of the NHPA;
- 18 3. A judgment that the Service failed to comply with the requirements
19 of the NHPA, and that such failure constitutes agency action
20 unlawfully withheld as provided by Section 706(1) of the APA;
- 21 4. A judgment that the Service failed to comply with the requirements
22 of the APA insofar as its failure to comply with the NHPA is
23 arbitrary, capricious, not in accordance with procedures required by
24 law, and constitutes agency action that is unlawfully withheld as
25 provided by the APA, 5 U.S.C. §§ 701-706;
- 26 5. An order vacating and setting aside the Tehachapi Uplands Multiple
27 Species Habitat Conservation Plan, Biological Opinion, Incidental
28

1 Take Permit, and Record of Decision pending the Service's
2 compliance with the NHPA;

3 6. An order enjoining the Service from issuing further permits and
4 authorizations pursuant to the TUMSHCP pending the Service's
5 compliance with the NHPA;

6 7. An award to Plaintiffs of their costs of litigation, including
7 reasonable attorneys' fees as provided in the Equal Access to Justice
8 Act and/or any other applicable law; and

9 8. Any other such relief as the Court deems just and proper.
10

11 Respectfully submitted this 25th day of April, 2019.
12
13

14 /s/ John Buse

15 John Buse

16 Lisa T. Belenky

17 John Rose

18 CENTER FOR BIOLOGICAL

DIVERSITY

19 Jason Weiner

20 WISHTOYO FOUNDATION

21 Attorney for Plaintiffs
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