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14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF NEVADA**

16 CENTER FOR BIOLOGICAL DIVERSITY;

Case No.:

17 Plaintiff,

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

18 vs.

19 DAVID BERNHARDT, in his official capacity
20 as Secretary of the U.S. Department of Interior;
21 AURELIA SKIPWITH, in her official capacity
22 as Director of the U.S. Fish and Wildlife
23 Service; GLEN KNOWLES, in his official
24 capacity as Field Supervisor of the Southern
25 Nevada Fish and Wildlife Office; U.S. FISH
26 AND WILDLIFE SERVICE; WILLIAM
27 DUNKELBERGER, in his official capacity as
28 Humboldt-Toiyabe National Forest Supervisor;
and U.S. FOREST SERVICE;

Defendants.

Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Plaintiff” or the “Center”), by
and through its attorneys of record, hereby complains and alleges as follows:

INTRODUCTION

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2 1. The Center challenges Defendants’ failure to comply with the Endangered
3 Species Act (“ESA”), the National Environmental Policy Act (“NEPA”), the National Forest
4 Management Act (“NFMA”), and the Administrative Procedure Act (“APA”) in issuing a
5 Biological Opinion, Final Environmental Impact Statement, and Record of Decision authorizing
6 construction of Phase 1 of the Lee Canyon Ski Area Master Development Plan.

7 2. The Lee Canyon Ski Area (“Ski Area”)—located entirely on National Forest
8 System lands in the Spring Mountain National Recreation Area (“SMNRA”)—is seeking the
9 necessary Federal approvals for a proposal to significantly expand its operations. If allowed to
10 proceed, the proposal would expand the boundaries of the Ski Area, disturb hundreds of acres
11 within the SMNRA, and—for the first time in the Ski Area’s history—develop new summer
12 recreation infrastructure including high-speed mountain bike trails and amusement-park-style
13 attractions such as a zip line and a “mountain coaster.” The expansion plan would bring tens of
14 thousands of new summer visitors to national forest system lands in Lee Canyon, significantly
15 and adversely affecting several imperiled wildlife species including the endangered Mount
16 Charleston blue butterfly (“butterfly”). The butterfly, which is found nowhere else on Earth, is
17 critically endangered due to its limited range and the expansion of human development within its
18 habitat in the Spring Mountains.

19 3. Defendants have unlawfully authorized this major ski area expansion without
20 properly considering the impacts of the new summer recreation facilities—and the associated
21 increased summer visitation—on the many sensitive resources within the SMNRA, including the
22 butterfly and its critical habitat.

23 4. The Center specifically challenges: (1) Defendant U.S. Fish and Wildlife
24 Service’s (“FWS”) June, 15 2020 Final Biological Opinion for Phase 1 of the Lee Canyon Ski
25 Area Master Development Plan (“2020 BiOp”) as unlawful under the ESA and arbitrary and
26 capricious under the APA; (2) Defendant U.S. Forest Service’s (“Forest Service”) October 9,
27 2020 Final Environmental Impact Statement for Phase 1 of the Lee Canyon Ski Area Master
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1 Development Plan (“FEIS”) as arbitrary, capricious, and unlawful under NEPA and the APA; the
2 Forest Service’s arbitrary, capricious, and unlawful reliance on the 2020 BiOp in issuing the
3 November 9, 2020 Record of Decision for Phase 1 of the Lee Canyon Ski Area Master
4 Development Plan (“ROD”) under the ESA; and the Forest Service’s arbitrary, capricious, and
5 unlawful, project-specific amendments to the Humboldt-Toiyabe National Forest’s Land and
6 Resource Management Plan (“Forest Plan”) as contrary to NFMA and the APA.

7 5. The Center seeks declaratory relief that FWS violated the ESA and APA in
8 issuing and approving the 2020 BiOp; that the Forest Service violated NEPA and the APA in
9 issuing the FEIS; that the Forest Service violated the ESA and the APA in unlawfully relying on
10 the 2020 BiOp in issuing and approving the ROD; and that the Forest Service violated NFMA
11 and the APA in unlawfully issuing and approving two project-specific amendments to the Forest
12 Plan. The Center further seeks vacatur of the 2020 BiOp, FEIS, and ROD, and injunctive relief to
13 enjoin any implementation of the ROD.

14 **JURISDICTION**

15 6. Jurisdiction is proper in this Court under 28 U.S.C. § 1331; 28 U.S.C. § 1346; 5
16 U.S.C. §§ 551-706; and 16 U.S.C. § 1540(g) because this action involves the United States as a
17 defendant and arises under the laws of the United States, including the ESA, 16 U.S.C. §§ 1531-
18 1544, NEPA, 42 U.S.C. § 4332, NFMA, 16 U.S.C. §§ 1600-14, and the APA, 5 U.S.C. §§ 551-
19 706. The Center provided Defendants FWS and the Forest Service with notice of the Center’s
20 intent to file suit pursuant to the ESA citizen suit provision. 16 U.S.C. § 1540(g)(2). An actual
21 justiciable controversy exists between Plaintiff and Defendants. The requested relief is proper
22 under 28 U.S.C. §§ 2201 and 2202; 5 U.S.C. §§ 705 and 706; and 16 U.S.C. § 1540(g). The
23 challenged agency actions are final and subject to this Court’s review under 5 U.S.C. §§ 702,
24 704, and 706.

25 **VENUE**

26 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. §
27 1540(g)(3)(A) because Defendants FWS and the Forest Service have offices in this judicial
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1 district, a substantial part of the events or omissions giving rise to the claims in this Complaint
2 occurred in this judicial district, and the lands involved in this case are located in this judicial
3 district.

4 8. Venue is proper in the Southern Division of this District, as the challenge involves
5 federal lands and resources in Clark County. L.R. 1A 8-1.

6 **PARTIES**

7 9. The Center is a non-profit corporation headquartered in Tucson, Arizona, with
8 offices and staff in several states including Nevada. The Center works through science, law, and
9 policy to secure a future for all species, great or small, hovering on the brink of extinction. The
10 Center is actively involved in endangered species and habitat protection nationwide, and has
11 more than 81,000 members throughout the United States and the world.

12 10. The Center brings this action on its own behalf, and on behalf of its members who
13 derive scientific, aesthetic, recreational, and spiritual benefits from the highly endemic wildlife
14 species that would be significantly impacted by the proposed expansion of the Ski Area,
15 including the endangered butterfly.

16 11. The Center's members, including Patrick Donnelly, the Center's Nevada State
17 Director, Christina Giunchigliani, and Brenda Talley use and enjoy the SMNRA for a variety of
18 purposes, including hiking, camping, photographing scenery and wildlife, viewing wildlife and
19 signs of wildlife, and engaging in other vocational, scientific, and recreational activities. The
20 areas of the SMNRA that Mr. Donnelly, Ms. Giunchigliani, Ms. Talley, and other Center
21 members use and enjoy include specific areas impacted by the proposed expansion of the Ski
22 Area, and specific areas where the butterfly may be found.

23 12. Mr. Donnelly, Ms. Giunchigliani, Ms. Talley, and other Center members derive
24 health, aesthetic, recreational, inspirational, spiritual, scientific, and educational benefits from
25 their activities within the SMNRA. Mr. Donnelly intends to continue to use and enjoy the
26 SMNRA frequently and on an ongoing basis in the future, including this fall and winter. Ms.
27 Giunchigliani has had a second home on Mount Charleston for four decades and visits the area
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1 frequently, though she prefers to avoid winter recreation in Lee Canyon due to the noise and
2 trash from the ski area. Ms. Talley is a fourth generation Las Vegan, whose grandparents taught
3 her about the rare endemic species of Mount Charleston. She lives full time on Mount Charleston
4 and visits Lee Canyon regularly, though less frequently in recent years due to impacts from
5 recreation. The areas of the SMNRA that Mr. Donnelly and other Center's members intend to
6 continue to use and enjoy include specific areas that the Ski Area's proposed expansion would
7 directly and indirectly affect, and specific areas where the butterfly may be found.

8 13. The health, aesthetic, recreational, inspirational, spiritual, scientific, and
9 educational interests of Mr. Donnelly, Ms. Giunchigliani, Ms. Talley, and other Center members
10 have been and will continue to be adversely affected and irreparably injured if Defendants'
11 ongoing violations of the ESA, NEPA, NFMA, and APA continue. These are actual, concrete
12 injuries caused by the Defendants' violations of the ESA, NEPA, NFMA, and APA. The relief
13 sought will redress the Center and its members' injuries.

14 14. Defendant David Bernhardt is the Secretary of the Interior. As the Secretary of the
15 Interior he has the ultimate responsibility to administer and implement the ESA, and to comply
16 with all other federal laws applicable to the U.S. Department of the Interior, including NEPA.
17 Secretary Bernhardt is sued in his official capacity.

18 15. Defendant Aurelia Skipwith is the Director of FWS, a federal agency within the
19 Department of the Interior. The Secretary of the Interior has delegated his authority to administer
20 the ESA to FWS for non-marine wildlife and plants. 50 C.F.R. § 402.01(b). Director Skipwith is
21 sued in her official capacity.

22 16. Defendant Glen Knowles is the Field Supervisor of FWS's Southern Nevada
23 Office. The Southern Nevada office is responsible for administering the ESA with respect to
24 threatened and endangered species and their habitats in southern Nevada, including in the
25 SMNRA. Field Supervisor Knowles is sued in his official capacity.

26 17. Defendant U.S. Fish and Wildlife Service is an agency within the U.S.
27 Department of the Interior. It and its officers are responsible for administering the ESA,
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1 particularly regarding potential impacts to wildlife species that have been listed as threatened or
2 endangered with extinction pursuant to the ESA.

3 18. Defendant William Dunkelberger is the Supervisor of the Humboldt-Toiyabe
4 National Forest. As Forest Supervisor, he is responsible for administering National Forest
5 System lands and resources within the SMNRA. Supervisor Dunkelberger is sued in his official
6 capacity.

7 19. Defendant U.S. Forest Service is an agency within the U.S. Department of
8 Agriculture. It and its officers are responsible for the lawful management of the national forest
9 system, including the SMNRA.

10 **STATUTORY BACKGROUND**

11 **A. The Endangered Species Act**

12 20. Congress enacted the ESA in 1973 to provide “a program for the conservation of
13 . . . endangered species and threatened species.” 16 U.S.C. § 1531(b). Section 2(c) of the ESA
14 establishes that it is the policy of Congress that all federal agencies shall seek to conserve
15 threatened and endangered species, and shall utilize their authorities in furtherance of the
16 purposes of this Act. *Id.* § 1531(c)(1).

17 21. The ESA defines “conservation” to mean “the use of all methods and procedures
18 which are necessary to bring any endangered species or threatened species to the point at which
19 the measures provided pursuant to [the ESA] are no longer necessary.” *Id.* § 1532(3).

20 22. Section 4 of the ESA directs the Secretary of the Interior to list species that are
21 threatened or endangered with extinction, and to designate “critical habitat” for such species. *Id.*
22 § 1533(a).

23 23. The ESA defines “critical habitat” as the area that contains the physical or
24 biological features essential to the “conservation” of the species and which may require special
25 protection or management considerations. *Id.* § 1532(5)(A). The ESA lays out a specific process
26 for the designation and revision of critical habitat. *Id.* § 1533(a) & (b). Any designation of
27 critical habitat must be based on the best scientific data available. *Id.* § 1533(b)(2).
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1 24. Section 9 of the ESA and its implementing regulations prohibit the unauthorized
2 “take” of any endangered or threatened species of fish or wildlife. *Id.* §§ 1538(a)(1), 1533(d); 50
3 C.F.R. § 17.31. “Take” is defined broadly to include harming, harassing, trapping, capturing,
4 wounding or killing a protected species either directly or by degrading its habitat. 16 U.S.C. §
5 1532(19).

6 25. Section 7(a)(2) of the ESA requires each federal agency, in consultation with
7 FWS, to ensure that any action authorized, funded, or carried out by the agency is not likely to
8 jeopardize the continued existence of any threatened or endangered species, or result in the
9 destruction or adverse modification of the critical habitat of such species. *Id.* § 1536(a)(2).
10 “Destruction or adverse modification” of critical habitat means “a direct or indirect alteration
11 that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed
12 species.” 50 C.F.R. § 402.02. During consultation, both the action agency and FWS must use the
13 best scientific data available. 16 U.S.C. § 1536(a)(2).

14 26. For each proposed federal action, the action agency must request that FWS
15 determine whether any listed or proposed species may be present in the area of the proposed
16 action. *Id.* § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the
17 action agency must prepare a “biological assessment” to determine whether the listed species
18 may be affected by the proposed action. *Id.* If the agency determines that its proposed action may
19 affect any listed species or critical habitat, the agency must engage in “formal consultation” with
20 FWS. 50 C.F.R. § 402.14.

21 27. To complete formal consultation, FWS must provide the action agency with a
22 “biological opinion” explaining how the proposed action will affect the listed species or critical
23 habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. A biological opinion must analyze whether a
24 project is likely “to reduce appreciably the likelihood of both the survival and recovery of a listed
25 species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50
26 C.F.R. § 402.02.

1 28. If FWS concludes in the biological opinion that the proposed action is likely to
2 jeopardize the continued existence of a listed species, or to result in the destruction or adverse
3 modification of critical habitat, FWS must outline “reasonable and prudent alternatives” to the
4 proposed action that FWS believes would not jeopardize listed species or result in the destruction
5 or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3)(A).

6 29. If, however, FWS concludes in the biological opinion that the proposed action is
7 not likely to jeopardize the continued existence of a listed species, and is not likely to result in
8 the destruction or adverse modification of critical habitat, FWS must provide an “incidental take
9 statement” (“ITS”) along with the biological opinion, specifying the amount or extent of such
10 incidental taking on the species, any “reasonable and prudent measures” that FWS considers
11 necessary or appropriate to minimize such impact, and setting forth the “terms and conditions”
12 that must be complied with by the action agency to implement those measures. *Id.* § 1536(b)(4);
13 50 C.F.R. § 402.14(i).

14 30. Taking that is in compliance with the terms and conditions of an ITS in a
15 biological opinion is exempt from the Section 9 take prohibition. 16 U.S.C. § 1536(o)(2).

16 31. In order to monitor the impacts of incidental take, the action agency must report
17 the impact of its action on the listed species to FWS. 50 C.F.R. § 402.14(i)(3). If during the
18 course of the action the amount or extent of incidental taking is exceeded, the action agency and
19 FWS must reinitiate consultation immediately. *Id.* §§ 401.14(i)(4), 402.16.

20 **B. The National Environmental Policy Act**

21 32. NEPA is our “basic national charter for protection of the environment.” 40
22 C.F.R. § 1500.1(a). It serves twin goals. First, it aims to ensure that federal agencies carefully
23 consider detailed information regarding the environmental impact of a proposed action before
24 reaching a decision on the action. Second, it ensures that information about the impacts is made
25 available to members of the public so that they may play a role in the decision-making process.
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1 33. NEPA and its implementing regulations require federal agencies to prepare an
2 environmental impact statement (“EIS”) for all “major Federal actions significantly affecting the
3 quality of the human environment.” 42 U.S.C. § 4332(C)(i); 40 C.F.R. § 1501.4.

4 34. In preparing an EIS, the agency must take a “hard look” at all direct, indirect, and
5 cumulative environmental impacts of the proposed action and its alternatives. 40 C.F.R. §§
6 1502.14, 1502.16. To fulfill its purpose, an EIS must “provide full and fair discussion of
7 significant environmental impacts and shall inform decisionmakers and the public of the
8 reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality
9 of the human environment.” *Id.* § 1502.1

10 35. An EIS must rigorously explore and objectively evaluate all reasonable
11 alternatives to the actions considered in the EIS, including a baseline alternative of taking “no
12 action.” *Id.* § 1502.14. The discussion of alternatives is considered “the heart of the
13 environmental impact statement.” *Id.*

14 36. While agencies enjoy considerable discretion to define the purpose and need for a
15 project, an agency may not define its objectives so narrowly that it forecloses the consideration
16 of a reasonable range of alternatives.

17 **C. The National Forest Management Act**

18 37. NFMA governs the U.S. Forest Service’s management of the national forests,
19 including the Humboldt-Toiyabe National Forest and the SMNRA.

20 38. NFMA establishes a two-step process for forest planning. First, it requires the
21 Forest Service to develop, maintain, and revise land and resource management plans (“forest
22 plans”) for each national forest. *Id.* § 1604(a); *see also* 36 C.F.R. § 219.5.

23 39. In the second step of the forest planning process, the Forest Service assesses site-
24 specific actions. All site-specific decisions must be consistent with the forest plan. 16 U.S.C. §
25 1604(i); 36 C.F.R. § 219.15. Additionally, each project or activity approval document must
26 describe how the project or activity is consistent with applicable plan components. 36 C.F.R. §
27 219.15(d).
28

1 40. The Forest Service has promulgated regulations implementing NFMA’s planning
2 requirements. *See Id.* §§ 219.1-219.19. These regulations allow the Forest Service to amend a
3 forest plan “at any time,” *id.* § 219.13(a), but all amendments must be supported by the best
4 available science. *Id.* § 219.3.

5 41. Specifically, “[t]he responsible official . . . shall determine what information is the
6 most accurate, reliable, and relevant to the issues being considered,” and “document how the best
7 available scientific information was used to inform . . . the plan or amendment decision.” *Id.*
8 Such documentation must “[i]dentify what information was determined to be the best available
9 scientific information, explain the basis for that determination, and explain how the information
10 was applied to the issues considered.” *Id.*

11 42. The applicable forest plan for the Spring Mountain National Recreation Area is
12 the Humboldt-Toiyabe Forest Plan. It states that the SMNRA shall be managed for six general
13 purposes, most of which emphasize conservation rather than recreational use: (1) “The
14 conservation of scenic, scientific, historic, cultural, and other values contributing to public
15 enjoyment,” (2) “The conservation of fish and wildlife populations and habitat,” (3) “The
16 protection of watersheds and the maintenance of free flowing streams and the quality of ground
17 and surface waters,” (4) “Public outdoor recreation benefits, including, but not limited to,
18 hunting, fishing, trapping, hiking, horseback riding, backpacking, rock climbing, camping, and
19 nature study,” (5) Congressionally designated wilderness, and (6) “The management and use of
20 natural resources in a manner compatible with the purposes for which the Recreation Area was
21 established.”

22 **D. The Administrative Procedure Act**

23 43. The APA provides for judicial review of federal agency actions for persons
24 adversely affected or aggrieved by the agency action. 5 U.S.C. § 702. Agency action made
25 reviewable by statute and final agency action for which there is no other adequate remedy are
26 subject to judicial review. *Id.* § 704.

1 50. The butterfly, found nowhere else, is on the brink of extinction. Since it was listed
2 as an endangered species in 2013 the butterfly has experienced substantial habitat degradation
3 and population loss. Nearly a quarter of known butterfly populations have been extirpated.

4 51. The butterfly is threatened by: (1) recreational development and forest
5 management projects; (2) loss and degradation of habitat due to changes in natural fire regimes
6 and succession; (3) invasion of nonnative plants; (4) collection; (5) small population size and few
7 occurrences; and (6) exacerbation of other threats from the impacts of climate change.

8 52. FWS has identified the following physical and biological features as essential to
9 the butterfly's survival and recovery: elevations between 2,500 m (8,200 ft) and 3,500 m (11,500
10 ft); zero to 50 percent tree cover; widely spaced, low forbs and grasses, with exposed soil and
11 rock substrates; the presence of one or more species of larval host plants; the presence of one or
12 more species of nectar plants; and habitat where natural disturbance such as fire creates and
13 maintains openings in the canopy.

14 53. The butterfly's viability also depends on vegetation structure and composition
15 among and adjacent to host and nectar plants.

16 54. The butterfly exhibits "metapopulation" dynamics, which require the protection
17 and maintenance of a network of connected habitat patches. Butterfly habitat in the Spring
18 Mountains is constantly shifting, and individual butterflies migrate across a dynamic matrix of
19 habitat patches in response to fluctuating and ever-changing microclimatic conditions that affect
20 habitat quality both spatially and temporally. Accordingly, the butterfly requires a high level of
21 connectivity between habitat patches—and across areas of currently marginal or unsuitable
22 habitat—for its survival and recovery.

23
24 **C. Critical Habitat Designation for the Mount Charleston Blue Butterfly**

25 55. FWS designated critical habitat for the butterfly in 2015. The designated critical
26 habitat encompasses approximately 5,214 acres across three distinct areas in the Spring
27 Mountains.

1 56. Based on the butterfly’s habitat needs, FWS’ final critical habitat designation
2 defined “primary constituent elements” (“PCEs”) essential for the butterfly’s survival and
3 recovery. These include areas of high-elevation dynamic habitat with an open forest canopy, few
4 tall grasses and forbs, and sufficient concentrations of host or nectar plants.

5 57. To designate critical habitat, FWS mapped areas containing PCEs where
6 butterflies have been observed. FWS then “buffered” the boundaries of these areas by up to
7 1,000 meters to ensure adequate connectivity between habitat patches. FWS explained that it
8 chose the 1,000 meter figure because it represents the approximate outer range of the butterfly’s
9 dispersal distance.

10 58. FWS excluded from critical habitat a 25-meter perimeter around areas with
11 developed infrastructure or “recreational features.” FWS explained that “[h]igh levels of
12 recreational disturbance in these areas have either severely degraded available habitat, including
13 host and nectar plants, or the intense level of recreational activity severely limits or precludes the
14 use of these areas by the Mount Charleston blue butterfly.”

15 59. The butterfly’s designated critical habitat consists of three distinct areas, or
16 “critical habitat units” (CHUs): South Loop (CHU 1), Lee Canyon (CHU 2), and North Loop
17 (CHU 3).

18 60. The Lee Canyon CHU is essential to the butterfly’s survival and recovery because
19 it contains approximately half of the total designated critical habitat, as well as a key
20 “metapopulation.”

21 61. The Lee Canyon CHU is also important to the subspecies’ survival and recovery
22 due to the current condition of the two other CHUs. No butterflies have been observed in the
23 North Loop CHU since 1995. And while the South Loop has historically contained the most
24 robust population of butterflies out of the three CHUs, at least half of the South Loop CHU
25 burned in the 2013 Carpenter 1 fire—the largest wildfire in the Spring Mountains in recorded
26 history.
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1 62. FWS has explained that habitat connectivity within the Lee Canyon CHU is
2 especially important. There are small areas with PCEs distributed across the Ski Area’s Special
3 Use Permit Area, and the ability of the butterfly to move among or between patches of habitat
4 within the CHU is necessary and essential for the conservation and recovery of the subspecies.

5 63. Within the Lee Canyon CHU, one of the leading recognized threats to the
6 butterfly is “implementation of recreational development projects.” FWS has specifically noted
7 that “features essential to the conservation of the species in [the Lee Canyon CHU] require
8 special management considerations or protection,” including “management of recreational
9 activities to protect and prevent disturbance of Mount Charleston blue butterflies to reduce loss
10 or deterioration of habitat.”

11 **D. The Lee Canyon Ski Area & Expansion Plan**

12 64. The Ski Area is located entirely within the SMNRA and operates on National
13 Forest System lands under a Special Use Permit issued by the Forest Service.

14 65. In 2011, the Ski Area finalized a new Master Development Plan (“MDP”).
15 Broken into Phase 1 and Phase 2, the MDP describes the Ski Area’s plan to renovate existing
16 infrastructure and develop new facilities over time.

17 66. Phase 1 of the MDP includes the ongoing maintenance and operation of existing
18 facilities as well as the development of new facilities. The new facilities include three new ski
19 lifts with a combined capacity of over 3,600 riders per hour, “glading” (i.e., tree removal)
20 between ski runs, an expanded snowmaking system, a 13-mile mountain bike trail system, a new
21 hiking trail, a zip line, and a “mountain coaster.” The expansion plan also includes a new parking
22 lot, which according to the 2020 BiOp would enable the Ski Area to accommodate a
23 “comfortable carrying capacity” of approximately 3,000 people.

24 67. FWS estimates that the project would directly impact approximately 120.8 acres
25 of critical habitat. Additionally, the proposed expansion could attract up to 10,000 mountain
26 biker visits in its first year alone, and this could increase to 25,000 biker visits per year in five to
27 ten years. On peak summer days, the Ski Area could see 650 mountain bikers, 1,500 people
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1 riding the mountain coaster, 300 individuals riding the zip line, and an unknown number of
2 hikers.

3 68. All ground disturbance, construction, and recreational use associated with Phase 1
4 of the MDP would occur within the Lee Canyon CHU.

5 **E. ESA Section 7 Consultation for the Ski Area Expansion Plan**

6 69. The Forest Service prepared a biological assessment (“BA”) in July 2019 to
7 examine the impacts of the Ski Area’s proposed expansion plan on the butterfly. Although the
8 entire expansion will take place within designated critical habitat, the BA only considers impacts
9 to so-called “suitable” butterfly habitat areas and ignores the vast majority of critical habitat
10 acres within and around the project area.

11 70. Based on habitat surveys conducted in the summer of 2016, the Forest Service’s
12 BA defined and delineated small areas of “suitable” habitat within the Lee Canyon CHU.
13 According to the Forest Service, these “suitable” habitat areas were found in 2016 to contain
14 certain densities of host and nectar plants. The BA identified a total of 172 acres of “suitable”
15 habitat within the 2,569 acre Lee Canyon CHU. “Suitable” habitat areas therefore make up just
16 6.7 percent of the total critical habitat acres within the CHU.

17 71. The Forest Service further divided these small areas of “suitable” habitat into
18 “core” and “non-core” areas. “Core” areas were defined as follows: “contiguous [25 square
19 meter] cells [within suitable habitat] with more than 312.5 square meters of potential habitat . . .
20 and any single cell with potential habitat lower than that threshold that provides the only
21 connection between two cells.” Alternatively, the Forest Service defined “core” areas as “[t]he
22 contiguous patches of habitat on the Blackjack and Bimbo ski runs as well as the patch at the
23 Gary Abbott site.” “Core” areas make up only 2.8 percent of the total project area and less than
24 one percent of total critical habitat within the Lee Canyon CHU.

25 72. “Non-core” areas are defined as all “suitable” habitat located outside of “core”
26 areas.
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1 73. Although the BA considered impacts to only a small percentage of the butterfly's
2 critical habitat, it nevertheless concluded—based on ground-disturbance impacts alone—that the
3 proposed ski area expansion “may affect and is likely to adversely affect the [butterfly].” The
4 Forest Service therefore began formal consultation with FWS as required under Section 7 of the
5 ESA. *See* 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

6 74. On December 13, 2019, FWS issued a biological opinion concerning the proposed
7 ski area expansion and its impacts on the butterfly (“2019 BiOp”). The 2019 BiOp adopted
8 entirely the Forest Service’s analytical framework as described above. Consequently, the 2019
9 BiOp only considered impacts to the “suitable” and “core” habitat areas designated in the Forest
10 Service’s BA.

11 75. The 2019 BiOp concluded that the ski area expansion proposal would impact 1.3
12 acres of “core” habitat and 13.7 acres of “suitable” habitat. Based on the small amount of “core”
13 habitat affected, along with “minimization measures” proposed by the Forest Service, the 2019
14 BiOp concluded that the proposed action was not likely to jeopardize the continued existence of
15 the butterfly or adversely modify the butterfly’s critical habitat. However, the 2019 BiOp failed
16 to consider impacts to designated critical habitat outside of “core” or “suitable” areas, and it did
17 not consider impacts to the butterfly from increased summer visitation or the use of new
18 recreational infrastructure.

19 76. On April 1, 2020 the Center notified FWS and the Forest Service that it intended
20 to sue for violations of the ESA related to the 2019 BiOp. In response to the Center’s notice
21 letter and other public input, FWS and the Forest Service agreed in April 2020 to reinstate
22 formal consultation pursuant to Section 7 of the ESA.

23 77. After reinstating formal consultation, FWS issued a revised biological opinion on
24 June 15, 2020 (“2020 BiOp”). The 2020 BiOp made few changes from the 2019 BiOp. Although
25 FWS slightly revised its methodology for calculating acres of “suitable” habitat, the 2020 BiOp
26 retained the 2019 BiOp’s reliance on the Forest Service’s 2016 habitat survey data and analytical
27 framework. Consequently, the 2020 BiOp, like the 2019 BiOp, excluded the vast majority of
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1 critical habitat in the Lee Canyon CHU from its analysis, focusing instead on small areas of so-
2 called “suitable” and “core” habitat designated by the Forest Service.

3 78. By retaining the Forest Service’s analytical framework, the 2020 BiOp ignores
4 impacts to large areas of critical habitat that FWS deemed essential for population maintenance
5 and recovery. FWS explained in its 2015 critical habitat designation that dispersal areas within
6 each CHU are “necessary and essential for the conservation and recovery of the [butterfly].” It
7 has also acknowledged that “areas with lower densities of the larval host plant may . . . be
8 important to the [butterfly], as these areas may be intermittently occupied or may be important
9 for dispersal.” These dispersal areas are—by definition—located outside of “suitable” and “core”
10 habitat.

11 79. The 2020 BiOp also restricts its analysis to the project’s construction footprint,
12 and thus ignores the broader impacts of expanded recreation operations, including an influx of
13 thousands of new summer visitors within the butterfly’s most important critical habitat.

14 80. The project’s primary purpose is to increase recreation use within the butterfly’s
15 critical habitat, including new summer activities such as mountain biking and ziplining. FWS
16 previously acknowledged that “recreational development” projects are a leading threat in the Lee
17 Canyon CHU. According to FWS’s listing decision, “[s]ummer activities would impact the
18 Mount Charleston blue butterfly and its . . . habitat by attracting visitors in higher numbers
19 during the time of year when larvae and larval host plants are especially vulnerable to
20 trampling.” And when FWS designated critical habitat, it excluded areas with “high levels of
21 public visitation and associated recreational disturbance” because such areas lack PCEs and other
22 essential habitat features. Yet the 2020 BiOp fails to consider potentially significant impacts to
23 connectivity, dispersal, or other essential life-cycle processes and habitat features from
24 dramatically increased summer visitation and recreation use.

25 81. The 2020 BiOp’s narrow focus on “suitable” habitat areas also ignores the
26 dynamic nature of the butterfly’s habitat. As noted, the critical habitat designation recognized
27 that “habitat is dynamic, the extent of habitat may shift, surveys have not occurred in every area,
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1 and butterflies move between patches of habitat” over time. Areas that serve as habitat in one
2 year might not provide habitat in another, and habitat conditions can vary over weeks, months,
3 and years. The 2020 BiOp utterly disregards the temporally dynamic nature of the butterfly’s
4 habitat and fixes its analysis at a single point in time.

5 82. Based largely on the Forest Service’s conclusion that only a small amount of
6 “suitable” habitat will be directly affected, FWS concluded in the 2020 BiOp that the Ski Area
7 expansion is not likely to jeopardize the continued existence of the butterfly, and is not likely to
8 destroy or adversely modify its critical habitat.

9 83. FWS also concluded in the 2020 BiOp that Ski Area expansion is reasonably
10 certain to result in “take” of the butterfly, and therefore the 2020 BiOp contains an ITS. FWS
11 claimed in the 2020 BiOp that it is unable to determine a numeric estimate or limit on take. FWS
12 relied instead on habitat disturbance as a surrogate measure for incidental take. The ITS allows
13 for the “harming or killing” of all individuals at all life stages within the 13.7 acres of “suitable”
14 habitat expected to be disturbed by construction activities.

15 **F. The Final Environmental Impact Statement & Project-Specific Forest Plan**
16 **Amendment**

17 84. As noted, NEPA requires an EIS for all “major Federal actions significantly
18 affecting the quality of the human environment.” 42 U.S.C. § 4332(C)(i). Pursuant to NEPA, The
19 Forest Service prepared a Final Environmental Impact Statement (“FEIS”) for Phase 1 of the
20 MDP.

21 85. In the FEIS, the Forest Service defined the purpose and need for the proposed
22 action as: (1) “Updat[ing] and renovat[ing] ski area infrastructure . . . to meet current standards
23 and the expectations of today’s recreation market,” (2) “Improv[ing] balance” between ski area
24 capacity and recreational demand, and (3) “Develop[ing] year-round recreational opportunities.”
25 The Forest Service’s statement of purpose and need thus adheres closely to the Ski Area’s
26 private development goals, and does not take into account the conservation goals for the
27
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1 SMNRA articulated in the Forest Plan or the Forest Service’s conservation mandates under the
2 ESA and other federal laws.

3 86. Based on this statement of purpose and need, the Forest Service developed two
4 “action” alternatives for the proposal: the Proposed Action, as described in the Ski Area’s MDP,
5 and the “Bristlecone Trail Alternative,” which includes all of the new recreational infrastructure
6 associated with Phase 1 of the MDP, but relocates some facilities to avoid impacting the
7 recreational values of the popular Bristlecone hiking trail.

8 87. The Forest Service identified the “Bristlecone Trail Alternative” as its preferred
9 alternative.

10 88. The FEIS concludes that the environmental impacts of the Bristlecone Trail
11 Alternative would be substantially similar to the Proposed Action, except with respect to
12 recreation. The Forest Service rejected a number of other reasonable alternatives, including a
13 conservation-focused alternative, a “winter only” alternative, and an alternative that would not
14 expand the Ski Area’s footprint beyond previously-developed areas.

15 89. Both the Proposed Action and the Bristlecone Trail Alternative would require
16 project-specific amendments to the Forest Plan. The Forest Plan includes a number of
17 environmental protection standards for the SMNRA. Most pertinently, SMNRA-wide standard
18 0.31 requires the siting of new “roads, administrative facilities, and developed recreation sites . .
19 . outside a 100-yard buffer zone” around Clokey’s eggvetch—a Humboldt-Toiyabe National
20 Forest sensitive plant species—and outside of “biodiversity hotspots.” Standard 11.57,
21 meanwhile, allows for “limited expansion” of the Ski Area, so long as the expansion “[d]oes not
22 impact any threatened, endangered, or sensitive species.” Both the Proposed Action and the
23 Bristlecone Trail Alternative would take place inside a “biodiversity hotspot,” authorize the
24 construction of recreational infrastructure within 100 yards of a known Clokey’s eggvetch
25 population, and impact special-status species, including the Mount Charleston blue butterfly.
26 Accordingly, the FEIS concludes that neither action alternative “could occur in compliance with
27 [Forest Plan] standards.”
28

1 90. The Forest Service did not analyze any action alternatives that would be
2 consistent with current Forest Plan standards. Nor did it consider any action alternatives that
3 would require fewer or less impactful changes to the Forest Plan.

4 91. The FEIS also fails to take the required “hard look” at the proposed action in
5 several respects. For example, the FEIS repeatedly claims that the proposed action may benefit
6 the butterfly and other imperiled wildlife species by removing tree cover. But the FEIS states
7 elsewhere that the “effect of tree removal on the ecology of Lee Canyon . . . is not carried into
8 in-depth analysis.” The Forest Service also admitted, in response to critical public comments,
9 that any future benefit from the proposed action is “speculative” and not based on data or
10 objective information.

11 92. The FEIS further fails to analyze impacts of increased summer recreational use
12 under the two action alternatives, and contains no quantified or detailed information about
13 where, when, and to what extent future recreational use is expected to occur. In response to
14 comments, the Forest Service provided an estimate of mountain bike trail use across the entire
15 trail system on a “typical” day, but also claimed that “projections” of summer visitation were
16 “irrelevant” to most of the resources analyzed in the FEIS, with the exception of “emergency
17 service, recreational impacts on [Bristlecone trail] users, and traffic effects.” The Forest Service
18 failed to meaningfully respond to public comments and scientific studies suggesting that
19 increased summer visitation could have significant impacts on the butterfly.

20 93. On November 9, 2020 the Forest Service issued a signed ROD for the Lee
21 Canyon Ski Area Master Development Plan Phase I. The ROD adopts the “Bristlecone Trail
22 Alternative” and authorizes construction of all recreational infrastructure associated with Phase 1
23 of the MDP. The Forest Service’s ROD also amends the Forest Plan to exempt the project from
24 standards 0.31 and 11.57. The ROD relies on FWS’s 2020 BiOp.

25 94. The Forest Service has not clearly identified what information it determined to be
26 the best available scientific information with respect to the project-specific Forest Plan
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1 amendments, explained the basis for that determination, or explained how the information was
2 applied to support the decision to amend the Forest Plan.

3 **FIRST CLAIM FOR RELIEF**

4 **FWS's 2020 BiOp Violates the ESA and the APA.**

5 95. The Center hereby incorporates by reference all preceding paragraphs.

6 96. FWS's 2020 BiOp for Phase 1 of the Lee Canyon Ski Area MDP is unlawful
7 under the ESA, and arbitrary and capricious under the APA, for the following reasons:

- 8 (1) failing to consider all relevant factors in making its jeopardy and adverse
9 modification determinations for the butterfly;
- 10 (2) failing to articulate a rational connection between the facts found and the
11 choices made in making its jeopardy and adverse modification
12 determinations for the butterfly;
- 13 (3) failing to consider all relevant factors and properly analyze the potential
14 effects of the ski area expansion on the recovery of the butterfly and its
15 critical habitat and/or setting a "tipping point" threshold for such effects;
- 16 (4) failing to provide a reasoned explanation and analysis concerning the
17 agency's change in position from earlier agency documents including the
18 2013 listing decision and the 2015 critical habitat designation;
- 19 (5) failing to analyze the effects of the entire agency action as required under
20 the ESA;
- 21 (6) failing to choose a proper surrogate instead of a numerical population
22 measure or any other sufficient measure of the incidental take authorized
23 for the butterfly;
- 24 (7) failing to provide the benefit of any doubt in favor of listed species when
25 evaluating the action's likely effects; and
- 26 (8) failing to use the best scientific and commercial data available.

27 97. FWS violated the ESA in preparing, issuing, and approving the 2020 BiOp. 16
28 U.S.C. § 1536; 50 C.F.R. § 402.14. The 2020 BiOp is arbitrary, capricious, an abuse of
29 discretion, and not in accordance with the ESA. 5 U.S.C. § 706(2)(A). The 2020 BiOp should be
30 held unlawful, set aside, and remanded to FWS. *Id.*

31 **SECOND CLAIM FOR RELIEF**

32 **The Forest Service Violated the ESA in Relying on FWS' 2020 BiOp.**

33 98. The Center hereby incorporates by reference all preceding paragraphs.

1 99. The 2020 BiOp is unlawful, and thus the Forest Service’s reliance on the 2020
2 BiOp in issuing, authorizing and approving the November 9, 2020 ROD for Phase 1 of the Lee
3 Canyon Ski Area MDP is arbitrary, capricious, and in violation of the ESA, 16 U.S.C. §
4 1536(a)(2).

5 100. Because the 2020 BiOp is unlawful, the Forest Service is in ongoing violation of
6 its affirmative and substantive duty, as the action agency, to insure that the authorization and
7 implementation of Phase 1 of the Lee Canyon Ski Area MDP is not likely to jeopardize the
8 continued existence of any threatened or endangered species, and is not likely to result in the
9 destruction or adverse modification of designated critical habitat, in violation of Section 7 of the
10 ESA. *Id.* The Forest Service cannot meet its ESA Section 7 obligations for the Phase 1 of the Lee
11 Canyon Ski Area MDP by relying on a biological opinion that is legally flawed. *Id.*

12 101. The Forest Service’s ROD for Phase 1 of the Lee Canyon Ski Area MDP is
13 arbitrary, capricious, an abuse of discretion, and contrary to the ESA. 5 U.S.C. § 706(2)(A). The
14 ROD should be held unlawful, set aside, and remanded to the Forest Service. *Id.*

15 **THIRD CLAIM FOR RELIEF**

16 **The Forest Service Violated NEPA and the APA in Issuing and Relying on the FEIS.**

17 102. The Center hereby incorporates by reference all preceding paragraphs.

18 103. The Forest Service’s FEIS and ROD for Phase 1 of the Lee Canyon Ski Area
19 MDP are unlawful under NEPA, and arbitrary and capricious under the APA, for the following
20 reasons:
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- 22 (1) failing to define the purpose and need for the project in a manner broad
23 enough to allow for consideration of a reasonable range of alternatives;
24 (2) failing to analyze a reasonable range of alternatives;
25 (3) failing to take the required “hard look” at the environmental impacts of the
26 proposed action; and
27 (4) failing to consider all relevant factors and articulate a rational connection
28 between the facts found and the choices made.

1 C. Declare that the Forest Service violated NEPA and the APA by issuing and
2 relying on the Final Environmental Impact Statement for Phase 1 of the Lee Canyon Ski Area
3 MDP;

4 D. Declare that the Forest Service violated NFMA and the APA by issuing the
5 Record of Decision for Phase 1 of the Lee Canyon Ski Area MDP;

6 E. Vacate, set aside, and remand the June 15, 2020 Biological Opinion;

7 F. Vacate, set aside, and remand the November 9, 2020 Record of Decision;

8 G. Enjoin the Forest Service from any implementation of the Lee Canyon Ski Area
9 MDP;

10 H. Award to the Center its costs, expenses, expert witness fees, and reasonable
11 attorney fees pursuant to applicable law including the Endangered Species Act, 16
12 U.S.C. § 1540(g); and Equal Access to Justice Act, 28 U.S.C. § 2412; and

13 I. Grant the Center such further relief as may be just, proper, and equitable.

14 Dated November 19, 2020

Respectfully submitted,

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17 RABKIN, LLP

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