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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

**MEDFORD DIVISION**

**OREGON WILD,** an Oregon nonprofit Corporation and **WILDEARTH GUARDIANS**, a New Mexico nonprofit corporation,

Plaintiffs,

vs.

**UNITED STATES FOREST SERVICE**, **MICHAEL RAMSEY**, in his official capacity as Lakeview District Ranger, **JEANNETTE WILSON**, in her official capacity as Silver Lake District Ranger, **RANDY MOORE**, in his official capacity as Chief of the U.S. Forest Service, and **THOMAS VILSACK**, in his official capacity as Secretary of Agriculture,

Defendants.

Case No. 1:22-cv-01007-MC

**[PROPOSED] *AMICUS CURIAE* BRIEF OF AMERICAN FOREST RESOURCE COUNCIL**

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## I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

*Amicus Curiae* American Forest Resource Council ("AFRC") is a regional trade association representing over 50 forest product businesses and forest landowners.[1] AFRC advocates for sustained-yield timber harvests on public timberlands throughout the West, including Oregon, to enhance forest health and resistance to wildfires, drought, insects, and disease.

One of AFRC's primary purposes is to advance its members' vital interest in preserving a reliable timber supply from National Forest lands. Many of AFRC's members rely heavily on federal timber to supply their mills, including the Fremont-Winema National Forest ("Forest"), because they do not own private timberlands. Declaration of Andy Geissler ("Geissler Decl.") ¶ 27. AFRC works to improve federal and state laws, regulations, and policies regarding access to and management of public forest lands, and actively participates in federal agency decisions that involve both federal and non-federal forest resources in Oregon. Geissler Decl. ¶ 4.

This case is centered on the Forest Service's application of the categorical exclusion ("CE") for "timber stand and/or wildlife habitat improvement" ("CE-6"), which expressly allows activities involving "thinning or brush control to improve growth or to reduce fire hazard" to proceed without requiring the preparation of an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA"). 36 C.F.R. § 220.6(e)(6). CE-6 enables the Forest Service to expedite thinning projects that improve growth or reduce fire risk so long as there are no extraordinary

[1] No party's counsel authored this brief in whole or in part, and no party or party's legal counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *Amicus Curiae* and its members—contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

circumstances for resource conditions that warrant additional NEPA analysis. 36 C.F.R. § 220.6(b).

AFRC advocates for the Forest Service to use all management tools available to accelerate forest restoration efforts, and CE-6 is one tool that can help address the increasing impacts of catastrophic wildfire events, insect and disease infestations, and mortality on National Forests. Geissler Decl. ¶ 32. AFRC has an interest in reducing the risk of wildfire events and improving forest health, while also ensuring a sustainable supply of timber for its members. Geissler Decl. ¶¶ 27, 29. The forest restoration work authorized under these Projects addresses heavy wildfire fuel loads present throughout the Forest. In AFRC's view, the two goals of improving forest health and securing a sustainable timber supply are not mutually exclusive, and accomplishing both is a win-win scenario for the Forest and local communities.

Specifically, AFRC has a strong interest in ensuring that these Projects are implemented expeditiously to promote forest health through fire resiliency treatments, including vital post-treatment prescribed burning, and improve wildlife habitat for various species. Geissler Decl. ¶¶ 7, 36; BW_AR_2897; SW_AR_12097; BW_AR_2884-85. AFRC also strongly supports projects developed through a collaborative process or under the Good Neighbor Authority ("GNA"). Further explained below, one of the Projects at issue here was developed in collaboration with members of the Klamath-Lake Forest Health Partnership, who have expressed their support for the Project, and will be implemented in partnership with the Oregon Department of Forestry ("ODF") under the GNA. Geissler Decl. ¶¶ 20, 29.

AFRC has recently defended the Forest Service's use of CE-6 in two Ninth Circuit cases. Geissler Decl. ¶¶ 33-34 (referencing AFRC's participation in *Mt. Cmtys. for Fire Safety v. Elliott*, 25 F.4th 667 (9th Cir. 2022) (*Mt. Cmtys.*), and *Los Padres ForestWatch v. U.S. Forest*

*Service*, No. 2:19-cv-05925-FMO-SS (C.D. Cal Feb. 25. 2021), *remanded on other grounds*, 25 F.4th 649, 663 (9th Cir. 2022). In both cases, the Ninth Circuit "agreed with the Forest Service's reading of CE-6" to include commercial harvest activities that reduce fire risk and, ultimately, upheld both projects. *See Mt. Cmtys.*, 25 F.4th at 682 (holding CE-6's "plain language did not bar the Forest Service from commercial thinning of trees to reduce fire risk"); *Los Padres ForestWatch*, 25 F.4th at 661 (9th Cir. 2022) (agreeing with the holding in *Mt. Cmtys.*).

AFRC's fundamental concern in this case is that plaintiffs seek to impede the Forest Service's ability to rely on CE-6 for commercial thinning projects that are aimed at reducing wildfire risks and improving wildlife habitat by relitigating settled Ninth Circuit precedent and are advocating for an interpretation of CE-6 that would impermissibly narrow its scope. Such a limiting interpretation would have broad implications for forest treatment projects and impermissibly impeded on the Forest Service's ability to combat wildfire risk.

Plaintiffs assert an "as-applied challenge under NEPA" to CE-6, claiming CE-6 was promulgated illegally and cannot apply to these Projects because they involve commercial thinning as part of the timber stand and wildlife habitat improvement work. Pls.' Mot. at 27-34 (ECF No. 16). Although plaintiffs claim to bring a timely "as applied" challenge to CE-6, AFRC agrees with Federal Defendants, that plaintiffs instead make an invalid facial challenge to CE-6 because their claim accrued in 1992 when CE-6 was published in the Federal Register, 57 Fed. Reg. 43,180 (Sept. 18, 1992), and became time barred in 1998. *See* 28 U.S.C. § 2401(a); Defs.' Cross-Mot. at 49-54 (ECF No. 24).[2] AFRC's arguments here, however, focus on the proper interpretation of CE-6 and whether the Forest Service appropriately relied on CE-6 to authorize

[2] Federal Defendants also correctly assert that the Forest Service has applied CE-6 to commercial thinning projects prior to 2018, such that plaintiffs were on notice that CE-6 has been applied "in a manner that harmed [their] interests." Defs.' Cross-Mot. at 51.

the Baby Bear Timber Stand and Wildlife Habitat Improvement Project ("Baby Bear Project", the South Warner Habitat Restoration Project ("South Warner Project"), and the Bear Wallow Timber Stand and Wildlife Habitat Improvement Project ("Bear Wallow Project").

## II. LEGAL FRAMEWORK

### A. National Environmental Policy Act.

NEPA establishes the procedures by which federal agencies must consider the environmental impacts of their actions but does not dictate substantive results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Barnes v. U.S. DOT*, 655 F.3d 1124, 1131 (9th Cir. 2011); 42 U.S.C. §§ 4321 *et seq*. Regulations promulgated by the Council on Environmental Quality ("CEQ"), 40 C.F.R. §§ 1500-08, provide guidance for implementing NEPA, as do the Forest Service's own NEPA regulations. 36 C.F.R. Part 220.[3]

NEPA requires federal agencies to consider the impacts of actions that significantly affect the environment. 42 U.S.C. §§ 4321, 4331. Under NEPA, federal agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(C); *see Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008). An agency may prepare an EA to determine whether a Finding of No Significant Impact ("FONSI") is warranted or if a more extensive EIS should be prepared. 40 C.F.R. § 1501.4(b), § 1501.5(c)(1), § 1508.9.

Certain actions, however, are "categorically excluded" from the requirements to prepare an EA or EIS. 40 C.F.R. § 1501.4, § 1501.4(a)(2). Congress has established some CEs by statute, which are subject to specific procedures. *See, e.g.*, 16 U.S.C. § 6591b (insect and disease

[3] Both sets of regulations were amended in 2020, but those changes are not material here. All citations to the CEQ's regulations in this *amicus curiae* brief refer to those regulations as codified at 40 C.F.R. Part 1500 (2019).

treatments up to 3,000 acres), § 6591d (wildfire resilience projects up to 3,000 acres), § 6591e (mule deer and sage-grouse restoration activities up to 4,500 acres). The Forest Service has also established regulatory CEs for certain activities. 36 C.F.R. §§ 220.6(d), (e). Importantly, the "[a]pplication of a categorical exclusion is not an exemption from NEPA; rather, it is a form of NEPA compliance." *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096 (9th Cir. 2013).

Whether an action falls within a CE implicates substantial agency expertise. *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 858-59 (9th Cir. 1999). Courts are generally "most deferential when reviewing scientific judgments and technical analyses within the agency's expertise under NEPA." *Native Ecosystems Council v. Weldon*, 697 F.3d. 1043, 1051 (9th Cir. 2012) (internal quotation omitted). In addition, "an agency's interpretation of the meaning of its own [CE] should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation." *Alaska Ctr.*, 189 F.3d at 857; *see West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 924 (9th Cir. 2000).

Even if an action falls under a regulatorily-established CE, the Forest Service's regulations require it to determine whether there are no "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4; 36 C.F.R. §§ 220.6(a), (b). The Forest Service has identified seven "resource conditions" that the agency should consider when determining whether extraordinary circumstances exist. 36 C.F.R. § 220.6(b)(1). However, "[t]he mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion." 36 C.F.R. § 220.6(b)(2). Rather, it is "the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist." *Id.* Courts have upheld the Forest Service's extraordinary

circumstances determination where it "considered relevant scientific data, engaged in a careful analysis, and reached its conclusion based on evidence supported by the record." *Ctr. for Biological Diversity v. Ilano*, 928 F.3d 774, 783 (9th Cir. 2019).

**B. CE-6.**

The Forest Service has established many CEs ranging from repaving a parking lot to post-fire rehabilitation activities. *See* 36 C.F.R. §§ 220.6(d)-(e). In this action, plaintiffs challenge the Forest Service's application of CE-6 to the Baby Bear, South Warner, and Bear Wallow Projects. 36 C.F.R. § 220.6(e)(6). CE-6 excludes "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction" from the requirement to prepare an EA or EIS unless "extraordinary circumstances" are present. 36 C.F.R. §§ 220.6(e)(6), (b)(1).

CE-6 lists a number of non-exhaustive, illustrative examples of these improvement activities including "[t]hinning or brush control to improve growth or to reduce fire hazard" and "[p]rescribed burning to reduce natural fuel build-up and improve plant vigor." 36 C.F.R. §§ 220.6(e)(6)(ii), (iv). The Ninth Circuit has held that CE-6 also "unambiguously allows the Forest Service to thin trees, including larger commercially viable ones, to reduce fire hazard without having to conduct an EIS or EA." *Mt. Cmtys.*, 25 F.4th at 672. The Ninth Circuit concluded that "CE-6's plain language does not bar the Forest Service from commercial thinning of trees to reduce fire risk." *Id*. at 682.

## III. FACTUAL BACKGROUND

Catastrophic wildfire events are unfortunately the new-normal. The 2020 fire season in Oregon "was one of the worst in modern times," killing 11 people, burning more than 1.3 million acres, and destroying 3,522 buildings. Geissler Decl. ¶ 20 (citing ODF's FFR Program update).

The 2020 wildfire season cost over $130 million in direct suppression costs and $6.24 billion of indirect costs from loss of buildings, infrastructure, timber, and grazing resources. *Id.* Specifically, the Fremont-Winema National Forest has experienced significant wildlife events in the past few years including the Bootleg Fire, which became the third largest wildfire in Oregon's history, burning 400,000 acres and stretching 30 miles. Geissler Decl. ¶¶ 18, 31, 24.

Given that context, the Forest Service has proposed thinning projects to reduce wildfire risks and improve forest resiliency. Although plaintiffs bring one action challenging three projects, these Projects are geographically distinct and located within two different ranger districts—the South Warner Project is in the Lakeview Ranger District, and the Baby Bear and Bear Wallow Projects are in the Silver Lake Ranger District. SW_AR_12097; BW_AR_2884; BW_AR_2897.

The Forest Service appropriately determined all three Projects are consistent with CE-6 because they involve (1) thinning to reduce fire risk or prescribe burning to reduce fuel buildup or treatments to improve wildlife habitat; (2) do not include herbicide use; (3) do not require more than one mile of road construction; and (4) do not present any extraordinary circumstances. *See* SW_AR _12107-08; BW_AR_2891-92; BW_AR_2903-04. The Forest Service determined that the combination of variable density thinning and prescribed burning will reduce tree stand densities, overcrowding, and wildfire fuel build-up, which in turn improves forest health, plant vigor, and habitat quality, reducing the potential and severity for wildfire events.[4] SW_AR _12100-01; BW_AR _2885-88; BW_AR_2898-900. To date, the Forest Service has not offered

[4] Variable density thinning is a silvicultural treatment designed to accelerate development of late-successional habitat by applying a variety of harvest intensities within a stand and "will provide a mosaic of canopy cover, increasing open canopy habitat across the landscape." BW_AR_2886.

or advertised any commercial timber sales associated with these Projects. Geissler Decl. ¶¶ 8, 16, 24.

**A. The Baby Bear Project.**

Under CE-6, the Baby Bear Project authorizes variable density thinning and prescribed burning to reduce timber stand overcrowding, improve forest health, and improve wildlife habitat. BW_AR_2898-900. Of the 4,774-acre project area, commercial thinning is authorized on up to 3,000 acres. BW_AR_2898. Thinning and prescribed burning will improve the condition of summer and transition range habitat for mule deer and make resources available for shrub and forb growth. BW_AR_2898. Lodgepole pine and other conifer encroachment will be thinned, improving meadow habitat and riparian areas for mule deer, elk, bear, and bobcat, but no trees larger than 21-inches diameter at breast height ("dbh") or older than 150 years will be removed. BW_AR_2898-99. The Project also protects trees in Old-Growth Management Areas, where no commercial thinning will occur and thinning will favor retainment of larger and older trees. *Id.* Throughout the project area, forest health will be improved through removal of trees heavily infected with mistletoe. Geissler Decl. ¶ 12; BW_AR_2899.

**B. The South Warner Project.**

Over a hundred years of fire suppression in the South Warner Project area has built up considerable wildfire fuels, leaving it at high-risk for severe wildfires, disease, and insect infestations. SW_AR_12097. The project area has more conifer trees than is ecologically sustainable, and conifer encroachment has detrimentally affected the growth and development of tree species in riparian areas and in aspen, whitebark pine, and mountain mahogany stands due to increased competition for resources. *Id.*

To mitigate the impacts of overcrowding and wildfire risks, the Project authorizes variable density thinning in ponderosa pine and white fir stands; plantation and non-commercial thinning; prescribed burning, stream restoration treatments; and meadow/riparian treatments; aspen, juniper woodland, and mountain mahogany treatments; and shrubland treatments. SW_AR_12100-04. The Project involves about 69,567 acres of treatment, some of which is focused on improving whitebark pine habitat, recently listed as threatened under the Endangered Species Act. SW_AR_12099; 87 Fed. Reg. 76,882 (Dec. 15, 2022). Out of the entire project area, only 16,000 acres are authorized for commercial thinning and are outside of Inventoried Roadless Areas. Variable density thinning treatments will retain all ponderosa pine 150 years or older, and will retain white fir 150 years or older or greater than 30 inches dbh. SW_AR_12100.

The Forest Service approved the Project under CE-6 and CE-18, the restoration CE, 36 C.F.R. § 220.6(e)(18), because of culvert repair and replacement work to be conducted during stream restoration activities. SW_AR_12107-08; Geissler Decl. ¶ 15. Although this Project was approved under two CEs, the Forest Service thoroughly engaged with diverse stakeholders regarding the Project's proposed treatment activities. For example, prior to authorization, the Forest Service held two collaborative field trips: one with the Lake County Resources Initiative focused on aspen recovery, prescribed fire strategies, and treatment objectives; and another with the Klamath-Lake Forest Health Partnership. Geissler Decl. ¶ 13.

**C. The Bear Wallow Project.**

The Bear Wallow Project area contains dense timber stands with considerable build-up of wildfire fuels and conifer encroachment within mixed conifer stands. BW_AR_2884. Approved under CE-6, commercial thinning is authorized on up to 10,000 acres of the 17,200-acre project area. BW_AR_2885. One of the purposes of the Project is to reduce overcrowding and canopy

cover to the optimal level for mule deer habitat, which are known to migrate through the project area because it includes aspen stands and meadow and riparian habitat. BW_AR_2884-85. Thinning and prescribed burning will create more forest edge and foraging areas, balanced with the mule deer's need for hiding and thermal cover. BW_AR_2885. Variable density thinning will result in stand densities that reduce competition and fuel loading around ponderosa pine and mature trees, but no tree species 21-inches dbh or larger, or 150 years old or older will be removed. BW_AR_2885-86. To reduce competition and fuel loading, lodgepole pine and white fir trees will be removed within 30 feet of mature ponderosa pine trees 9-inches dbh and larger. *Id.*

The Project was developed in collaboration with members of the Klamath-Lake Forest Health Partnership collaborative group. BW_AR_2884. It will be implemented in partnership with ODF through the GNA, which allows the Forest Service to enter partnership agreements with state agencies to conduct forest treatment projects on federal lands. Geissler Decl. ¶ 20, 29. Only "forest, rangeland, and watershed restoration services" can be authorized under the GNA, which includes improving wildlife habitat and "activities to treat insect- and disease-infected trees" and "activities to reduce hazardous fuels." Geissler Decl. ¶ 20 (quoting 16 U.S.C. § 2113a); P_AR_3666-67.

Pursuant to a GNA Master Agreement, ODF created the Federal Forest Restoration ("FFR") Program designed to accelerate the pace, scale, and quality of forest health restoration on Oregon's National Forests. To achieve this goal, the FFR Program provides financial support for collaborative groups and assistance with NEPA analyses, forest treatment implementation, and timber sale layout. Geissler Decl. ¶ 20; BW_AR_2908. ODF has been closely involved with planning the Bear Wallow Project since its inception and conducted field surveys for

wildlife and heritage resources for the Project. Geissler Decl. ¶ 21. ODF plans to prepare four commercial thinning contracts over the next few years, which are critical to meet the Forest's hazardous fuels targets and to fulfill the FFR Program's goal of increasing the pace and scale of forest restoration. *Id*.

## IV. ARGUMENT

### A. This Court Should Reject Plaintiffs' Attempt to Relitigate Ninth Circuit Precedent.

"Generally, '[a]n agency's determination that a particular action falls within one of its categorical exclusions is reviewed under the arbitrary and capricious standard.'" *Earth Island Inst. v. Elliott*, 318 F.Supp.3d 1155, 1173 (E.D. Cal. 2018) (quoting *Alaska Ctr.*, 189 F.3d at 857). The Forest Service's decision to invoke a CE is not arbitrary and capricious "if the agency reasonably determined that a particular activity is encompassed within the scope of" a particular CE. *Mt. Cmtys.*, 25 F.4th at 680; *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) (noting that an agency's decision that a project qualifies for a CE will be upheld "so long as the application of the exclusion[] to the facts of the particular action is not arbitrary and capricious" (citation and quotation marks omitted)).

Plaintiffs argue that CE-6 does not apply to commercial thinning treatments authorized for the three Projects, emphasizing the "type and scale" of these Projects, but are relitigating settled caselaw that CE-6 *unambiguously* allows commercial thinning activities. Pls.' Mot. at 24. The Ninth Circuit recently addressed this issue in two parallel cases involving shaded fuelbreaks on the Los Padres National Forest. In *Mountain Communities*, the Ninth Circuit upheld the Forest Service's application of CE-6 to the Cuddy Valley Project, which involved commercial thinning on 601 acres. 25 F.4th at 673. The court held that CE-6 "unambiguously allows the Forest Service to thin trees, *including larger commercially viable ones*, to reduce fire hazard

without having to conduct an EIS or an EA." *Mt. Cmtys.*, 25 F.4th at 672 (9th Cir. 2022) (emphasis added). The court explained that CE-6's "plain language does not limit thinning by tree age, size, or type. Nor is thinning defined to exclude commercial thinning. If the thinning project reduces fire hazard and meets certain other conditions, CE-6 greenlights the project, even if it means felling commercially viable trees." *Id*.

Similarly, in *Los Padres ForestWatch*, the same Ninth Circuit panel upheld the Forest Service's application of CE-6 to the Tecuya Ridge Shaded Fuelbreak Project, which authorized commercial thinning on 1,626 acres. 25 F.4th at 653. Although the issue of whether CE-6 encompasses commercial thinning was fully briefed on appeal, the Ninth Circuit addressed only whether the presence of extraordinary circumstances would preclude the Forest Service from relying on CE-6 because it had already held in *Mountain Communities* that the plain meaning of CE-6 allows the agency to "commercially thin trees, as long as the commercial thinning is used to accomplish forest improvement activities." *Id.* at 661. Accordingly, this Court should reject plaintiffs' invitation to circumvent settled Ninth Circuit precent.

**B. CE-6 Does Not Include an Acreage Limitation.**

Plaintiffs next assert that CE-6 must be limited by size and scale because it will impermissibly encompass projects with significant environmental effects. This argument is divorced from CE-6's text and there is no basis for this Court to impose such a limitation. This Court should reject plaintiffs' invitation to impose an acreage limitation when a plain reading of CE-6 imposes no such requirement. Courts are directed "neither to add [to] nor to subtract[]" from relevant language. *Ariz. State Bd. For Charter Schs. v. U.S. Dep't of Educ*., 464 F.3d 1003, 1007 (9th Cir. 2006). "Courts may not impose 'procedural requirements not explicitly enumerated in the pertinent statutes.'" *Earth Island Inst. v. Carlton*, 626 F.3d 462, 472 (9th Cir.

2010) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc)). Plaintiffs' interpretation of CE-6 instead involves "taking a red pen" to the text of CE-6 in a manner the Supreme Court has rejected. *Milner v. Dep't of Navy*, 562 U.S. 562, 573 (2011). Moreover, the Ninth Circuit has found no such limiting factor under CE-6.[5] Acknowledging that "[t]he Forest Service cannot rely on CE-6 without limit," the Ninth Circuit explained that "[t]imber stand improvement activities under CE-6 must still improve the composition, constitution, condition, or growth of the tree stand" and that "[p]rojects are also *limited in size* by CE-6's requirement that no more than one mile of low standard road may be constructed to carry out the project." *Mt. Cmtys.*, 25 F.4th at 682 (emphasis added).

To circumvent this clear Ninth Circuit precedent, plaintiffs claim the *Mountain Communities* decision is cabined by the Cuddy Valley Project's approximately 600-acre size. Pls.' Mot. at 23. When seeking rehearing, both the plaintiff-appellants and *amici curiae* (who are plaintiffs in this case) asserted that the Ninth Circuit's interpretation of CE-6 would allow *large-scale* commercial logging projects to proceed without preparation of an EA or EIS. *Mt. Cmtys.*, No. 20-55660 (ECF No. 44 at 16) (petition for rehearing noting that the panel's interpretation of CE-6 would result in an "unlimited amount of commercial thinning without first analyzing its impacts in an EA or EIS"); Defs.' Mot., Ex. A (ECF No. 21-1) (*amici curie* brief highlighting the broad implications of the decision because "the Forest Service now is planning and authorizing large-scale commercial logging projects via CE-6" on the Fremont-Winema National Forest). Despite allegations of a "parade of horribles" that could flow from the panel's

[5] Speciously, plaintiffs do not take issue with the acreage of the Projects' noncommercial activities, thereby conceding that the type and scale of those acreage amounts are irrelevant when determining whether a project falls within the scope of CE-6.

interpretation of CE-6, the Ninth Circuit rejected the request for a panel or *en banc* rehearing. *Id.* (ECF No. 60 (June 21, 2022; Order Denying Rehearing).

Moreover, it is incorrect to assume that thinning projects larger than the Cuddy Valley Project are of a "type and scale" that will result in significant environmental impacts. As cited above, Congress has enacted CEs ranging from 3,000 to 4,500 acres for wildfire resiliency projects. 16 U.S.C. § 6591d, § 6591e. Further, the Ninth Circuit Court has upheld the Forest Service's FONSI determination or reliance on CE-6 for larger projects. *See, e.g, All. For the Wild Rockies v. Pena*, 865 F.3d 1211 (9th Cir. 2017) (upholding the Forest Service's FONSI determination for a 12,802-acre project that included thinning activities); *Native Ecosystems Council v. Marten*, 2018 WL 6480709, at *2 (D. Mont. Dec. 10, 2018), *aff'd*, 800 F. App'x 543 (9th Cir. 2020) (upholding the Forest Service's 13,000-acre wildlife habitat improvement project approved under CE-6). Similar to a CE's no extraordinary circumstances determination, an EA's FONSI documents the absence of significant environmental effects.

Plaintiffs misrepresent that all other Forest Service CEs that authorize commercial harvest have an acreage limitation.[6] The Ninth Circuit recently addressed CE-4, the road maintenance CE, 36 C.F.R. § 220.6(d)(4), which allows commercial felling of hazardous dead or dying trees adjacent to roads. *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 990 (9th Cir. 2020) (*EPIC*). Plaintiffs cite *EPIC* to support their argument that the "type and scale" of a project is a limiting factor. Pls.' Mot. at 19-25. However, in *EPIC*, the Ninth Circuit determined

[6] Plaintiffs wrongly claim that the regulatory structure or context limits CE-6 to smaller scale thinning projects. The fact that the Forest Service's promulgation of the former "timber harvest CE" and CE-10 that were later enjoined—*see Heartwood, Inc. v. U.S. Forest Serv.*, 73 F.Supp.2d 962, 975 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947 (7th Cir. 2000) and *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007)—is irrelevant to the issue of whether CE-6 imposes an acreage limitation. Those cases involved facial challenges to the CEs; whereas, this case involves an as-applied challenge to CE-6.

that the project fell outside of the scope of CE-4 because it authorized removing some dead or dying trees that were not hazardous to roads and did not qualify as road maintenance. 968 F.3d at 990 ("We have no doubt that felling a dangerous dead or dying tree right next to the road comes within the scope of the 'repair and maintenance' CE. But the Project allows the felling of many more trees than that."). Other district courts have permitted the Forest Service's use of CE-4 for removing hazardous trees along roads, meaning trees "that will imminently fall," because they "have been individually evaluated to have a 'high' or 'moderate' hazard rating" and "are within striking distance of the road, which shall be determined based on the height of the tree." *Forestkeeper v. U.S. Forest Serv.*, No. 121-CV-01041-DADBAM, 2021 WL 4553885, at *7 (E.D. Cal. Oct. 5, 2021) (enjoining project implementation based on the Ninth Circuit's *EPIC* decision but allowing certain hazard tree removal activities to proceed); *but see Cascadia Wildlands v. Warnack*, 570 F.Supp.3d 983, 991 (D. Or. 2021) (finding that, like *EPIC*, a preliminary injunction was warranted because the project "does not target only trees that pose an immediate danger to travelers"). Thus, the issue in *EPIC* and its progeny is whether the *types of treatment activities* are limited to the removal of hazard trees along roads or, instead, encompass the removal of non-hazardous trees that fall outside of the scope of CE-4.

Unlike *EPIC*, all three Projects fall squarely within the scope of CE-6 because they involve activities explicitly included as examples of timber stand improvement or wildlife habitat improvement activities: "[t]hinning or brush control to improve growth or to reduce fire hazard … [and] [p]rescribed burning to reduce natural fuel build-up improve plant vigor." 36 C.F.R. § 220.6(e)(6)(ii), (iv). Here, the Forest Service used substantial technical expertise and reasonably determined that the thinning activities—to reduce overstocking, reduce fuel build-up, and make the forest more resilient to insects, disease, drought, and wildfire—fall within the scope of CE-6

because they will improve timber stand health and wildlife habitat. *See Alaska Ctr*., 189 F.3d at 858 n.5; *McNair*, 537 F.3d at 987.

### C. CE-6 Does Not *Per Se* Authorize Large-Scale Commercial Thinning Projects.

Plaintiffs allege that CE-6 cannot encompass commercial thinning operations because they are "associated with a host of significant environmental impacts." Pls.' Mot. at 4. But plaintiffs' myopic view of commercial activities cannot withstand scrutiny because it ignores the backstop of the agency's required "extraordinary circumstances" review. *See Mt. Cmtys.*, 25 F.4th at 680. To fall within the scope of any Forest Service-regulatory CE, a project must not present extraordinary circumstances such that the project would have a "significant environmental effect." 40 C.F.R. § 1508.4, § 1501.4(b). It is "the degree of the potential effect of a proposed action . . . that determines whether extraordinary circumstances exist." 36 C.F.R. § 220.6(b)(2). Because potential effects from thinning activities certainly will vary across different locations, not every thinning project to reduce fire risk can be authorized under CE-6.

Here, the Forest Service found that each Project did not present any extraordinary circumstances that would warrant further NEPA analysis. Tellingly, plaintiffs do not challenge the Forest Service's extraordinary circumstances determination for any of the Projects at issue. *See generally* Pls.' Mot. Instead, plaintiffs make generalized assertions of purported significant impacts from commercial thinning activities. Pls.' Mot. at 4-6.

The Ninth Circuit has acknowledged that the potential "availability of commercial timber is simply a collateral benefit to the government and does not change the purpose or scope of the project." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1248 (9th Cir. 2005); *accord League of Wilderness Defs. Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1126 n.1 (9th Cir. 2010). The incidental economic benefit from the commercial thinning does

not change the beneficial environmental impacts from thinning overcrowded stands, making them more resilient to insects and disease infestation, drought, and wildfire events. And each Project has specific design criteria to minimize impacts from thinning activities—whether commercial or noncommercial—to resource conditions. For example, the Baby Bear Project has design criteria to minimize the impacts from commercial thinning to wildlife habitat, soils, and the spread of invasive species; to help retain snag and old-growth trees; and to limit the impacts from skid trails and landings, among other things. *See, e.g.*, Supp_AR_190-205; *see also* Supp_AR_136-59 (design criteria for the South Warner Project).

Overall, authorization of commercial thinning provides the Forest Service with a means to help fund forest health treatment projects. Implementation of forest restoration projects through commercial thinning may be desirable to the Forest Service, who may not have the necessary funding or staffing to implement the much-needed restoration work independently. Therefore, commercial thinning is a cost-effective way to improve forest health while making efficient use of the agency's limited resources.

### D. The Forest Service Has a History of Relying on CE-6 for Commercial Thinning Projects.

Finally, plaintiffs wrongly assert that the Forest Service's reliance on CE-6 for commercial thinning is a recent sea-change from past agency practice. Pls.' Mot. at 14-16. The Forest Service has a history of using CE-6 to authorize timber stand and wildlife habitat improvement projects that involve commercial thinning. *See, e.g.*, Geissler Decl. ¶ 34 (the 2017 Bull Run Roadside Hazard Tree Mitigation Project on the Sequoia National Forest authorized 3,500 acres of commercial harvest); *id.* (the 2018 Spear Creek Roadside Hazard Tree Mitigation Project on the Sequoia National Forest authorized 1,250 acres of commercial harvest); P_AR_3535 (the 2014 Cordovas Restoration Thinning and Prescribed Fire Project included

commercial thinning); Supp_AR_169 (the 2006 Jack Creek and Rock Creek Meadows Fuels Reduction and Meadow Restoration Project included commercial thinning); *see also Conservation Cong. v. U.S. Forest Serv*., No. 2:12-cv-02416-WBS, 2013 WL 2457481, at *1 (E.D. Cal. June 6, 2013) (the 2012 Tatham Ridge Fuels Project relied on CE-6 and included 879 acres of fuel break construction, though the court ultimately held the Forest Service's no extraordinary circumstances determination was arbitrary and capricious).

The Forest Service's demonstrated history of relying on CE-6 for commercial treatment projects undercuts plaintiffs' assertion that there was a stark change in policy at the Forest Service in 2018 and implication that this was due to an agency response to Executive Order 13855. Pls., Mot. at 15. Moreover, the Forest Service's history of using CE-6 for commercial thinning projects also undercuts plaintiffs claim that their facial challenge is not time-barred. Pls.' Mot. at 34-35.

Plaintiffs' unsupported policy concerns do not justify narrowing the scope of CE-6 to apply only to smaller-scale or noncommercial thinning projects. Their interpretation of CE-6 has no support in the plain language of the regulation and, more importantly, is contrary to settled Ninth Circuit precedent. Plaintiffs' concern about the type and scale of the Projects at issue here ignores the backstop of the required extraordinary circumstances review, which plaintiffs also do not challenge. Therefore, the Forest Service's site-specific application of CE-6 to encompass the activities in these Projects is entitled to deference and should be upheld. *See Alaska Ctr*., 189 F.3d at 858 n.5.

## V. CONCLUSION

For the reasons stated above, this Court should deny plaintiffs' motion for summary judgment and uphold these Projects.

Dated this 29th day of March, 2023.

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## CERTIFICATE OF SERVICE

I, Sarah Melton, hereby certify that I, on March 29, 2023, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated this 29th day of March, 2023.

/s/ Sarah Melton
Sarah Melton