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

EARTH ISLAND INSTITUTE, a California
non-profit, and CENTER FOR BIOLOGICAL
DIVERSITY, a non-profit corporation
Plaintiffs,

vs.

UNITED STATES FOREST SERVICE,
ABIGAIL R. KIMBELL, in her official
capacity as Chief of the United States Forest
Service, and RAMIRO VILLALVAZO, in his
capacity as Forest Supervisor for Eldorado
National Forest

Defendants,

SIERRA PACIFIC INDUSTRIES,
Defendant-intervenor.

Case No.: 2:05-cv-01608-MCE-GGH

**SETTLEMENT AGREEMENT;
AND ORDER**

1 MCGREGOR W. SCOTT
2 United States Attorney
3 DAVID T. SHELLDY
4 Assistant United States Attorney
5 501 I Street, Suite 10-100
6 Sacramento, California 95814
7 Phone: (916) 554-2799
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1 WHEREAS, in August of 2005 the United States Forest Service issued Records of Decision for
2 the Power Fire Restoration Project and the Freds Fire Restoration Project, two post-fire salvage
3 logging projects on the Eldorado National Forest;

4
5 WHEREAS, on August 11, 2005, Earth Island Institute and Center for Biological Diversity
6 (hereafter "Plaintiffs") brought suit against United States Forest Service, Abigail R. Kimbell, in
7 her official capacity as Chief of the United States Forest Service, and, Ramiro Villalvazo, in his
8 capacity as Forest Supervisor for Eldorado National Forest (hereafter "Defendants") challenging
9 the Power Fire Restoration Project and the Freds Fire Restoration Project contending, *inter alia*,
10 that Defendants' approval of the projects violated the National Environmental Policy Act
11 ("NEPA") and the National Forest Management Act ("NFMA");

12
13 WHEREAS, on August 18, 2005, the District Court granted a Temporary Restraining Order
14 against implementation of timber sales pursuant to the Power Fire Restoration Project and the
15 Freds Fire Restoration Project;

16
17 WHEREAS, on August 25, 2005, the District Court denied Plaintiffs' request for a Preliminary
18 Injunction;

19
20 WHEREAS, on September 10, 2005, Plaintiffs filed a Notice of Appeal to the Ninth Circuit
21 Court of Appeals;

22
23 WHEREAS, on September 22, 2005, the Ninth Circuit Court of Appeals denied Plaintiffs'
24 request for an emergency stay pending appeal;

25
26 WHEREAS, on January 11, 2006, the Ninth Circuit Court of Appeals, reversed its earlier order
27 and granted Plaintiffs' request for an emergency stay pending appeal;

1 WHEREAS, on March 24, 2006, the Ninth Circuit Court of Appeals reversed the District Court's
2 denial of Preliminary Injunction finding that Plaintiffs had shown a strong likelihood of success
3 on the merits of their claims and had established the possibility of irreparable harm, and
4 Remanded the matter for proceedings consistent with the Ninth Circuit opinion;

5
6 WHEREAS, on July 12, 2006, the Ninth Circuit Court of Appeals denied Defendants' request
7 for en banc review;

8
9 WHEREAS, on August 31, 2006, the United States District Court issued a Preliminary
10 Injunction enjoining both the Power and Freds projects;

11
12 WHEREAS, on March 19, 2007, the United States Supreme Court denied Defendants' request
13 for a writ of certiorari;

14
15 NOW, THEREFORE, the parties agree to the following:

16
17 1. The Forest Service and Sierra Pacific Industries will be allowed to proceed with limited
18 operations pursuant to the salvage timber sales sold to implement the Power Fire Restoration
19 Project and the Freds Fire Restoration Project only as detailed herein:

- 20
21 a) The timber sale contracts for the Power Fire project shall expire as follows: East
22 Panther timber sale [July 31, 2007], Ellis East timber sale, [July 31, 2007]; Cole
23 Creek timber sale [July 31, 2007]; Bear River timber sale [October 31, 2007]; Rocky
24 Knob timber sale [October 31, 2007]; and Camp timber sale [July 30, 2007]. No
25 additional logging pursuant to these contracts shall occur, except as provided in
26 paragraph (c) below. Slash treatment activities, erosion control, and/or road
27 maintenance activities required of the Purchaser pursuant to these contracts shall be
28

1 completed by the contract termination dates listed above.

2
3 b) Within the Freds Fire Project Area no additional logging of timber sale units pursuant
4 to the Freds and Pebbles timber sale contracts shall occur. The Freds and Pebbles
5 timber sale contracts shall expire in their entirety July 30, 2007, and July 31, 2007
6 respectively. These contracts cannot be renewed for additional time beyond these
7 dates, except to allow for the completion of slash removal or slash treatment
8 activities, erosion control, and/or road maintenance activities (not including hazard
9 tree removal) as prescribed by the original contract. Any and all contract extensions
10 shall expire by December 31, 2007. No logging shall be allowed pursuant to any
11 extended contracts. Plaintiffs shall be notified of such proposed contract extensions
12 and shall be allowed to review the extension to ensure that it fully complies with this
13 Settlement Agreement (hereafter "Agreement") prior to its issuance.

14
15 c) Removal of road side hazard trees within the Power Fire Project Area and the Freds
16 Fire Project Area shall be allowed pursuant to the original timber sale contracts issued
17 in 2005, as limited herein. For the purposes of this Settlement Agreement only,
18 "hazard trees" are defined as dead trees with no green needles (i) that occur within
19 one tree length of roadways which are maintained for public use and (ii) which are
20 oriented in such a manner that they could fall on the roadway. Forest Service
21 personnel shall mark the hazard trees prior to removal. Plaintiffs will have ten days
22 (including weekends and holidays) to review the mark and lodge any objections with
23 the Forest Service. Once felled, hazard trees greater than 40 inches diameter at breast
24 height ("dbh") outside of Protected Activity Centers ("PACs") or 30 inches dbh
25 within PACs will be left on-site for habitat, except that, outside of PACs, the tops of
26 trees greater than 40 inches diameter which are 20 inches in diameter or smaller may
27 be removed. The definition of "hazard trees" notwithstanding, this order does not
28 preclude removal of individual trees that do not meet one or more of the criteria
outlined above (e.g., trees with some green needles) if the parties agree that the tree or

1 trees pose a threat to public safety. The roads along which hazard trees may be
2 marked and felled are listed on Exhibit A, attached hereto. If the removal of hazard
3 trees along roads listed in Exhibit A cannot be completed before the original timber
4 sale contract corresponding with the road/roads expires, then those specific contracts
5 may be extended until December 31, 2007. In the event that the original timber
6 contractor is unable or unwilling to remove recently designated hazard trees new
7 contracts for hazard tree removal may be issued pursuant to the Power and Freds'
8 FEISs and RODs, so long as they comply with this paragraph and expire on or before
9 December 31, 2007. Plaintiffs shall be notified if contract extensions are necessary or
10 if it is necessary to issue new contracts and shall be allowed to review these
11 documents to ensure that they fully comply with this Agreement prior to their
12 issuance. Erosion control, road maintenance and slash treatment associated with the
13 roads listed in Exhibit A shall be permitted.

14
15 d) Within the Freds Fire Project Area, the Forest Service is permitted to remove trees up
16 to 12 inches dbh and slash using hand methods within a 300-foot defense zone
17 adjacent to private property boundaries in the community of Kyburz.

18
19 e) Within the Power Fire and Freds Fire Project Areas the Forest Service is permitted to
20 burn existing slash piles.

21
22 f) Within the Power Fire Project Area, the Forest Service is permitted to perform road
23 repair on road 8N16.

24
25 2. The Forest Service will not reissue or approve any other timber sales or projects pursuant
26 to, or tiered to the Power FEIS and ROD or the Freds FEIS and ROD, except as provided in
27 paragraph 1c, 1d and 1e above. Extensions of current contracts shall be allowed pursuant to
28 paragraph 1b and 1c above.

1 3. The Forest Service shall pay attorneys' fees and costs to Plaintiffs in the amount of
2 \$147,000 (one hundred and forty seven thousand dollars) within sixty days of the entry of the
3 Order herein ("Order"). Request for payment shall be made within seven (7) days of entry of the
4 Order and payment shall be remitted to Rachel M. Fazio, Attorney at Law. Plaintiffs
5 acknowledge that payment of this amount to Rachel M. Fazio discharges in full all fees and costs
6 applicable to this action, including fees and costs requested on Appeal.

7
8 4. Nothing in this Agreement shall be interpreted as, or shall constitute, a commitment or
9 requirement that Defendants obligate or pay funds, or take any other action in contravention of
10 the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

11
12 5. This written Agreement contains all of the agreements between the parties, and is
13 intended to be the final and sole agreement between the parties. The parties agree that any prior
14 or contemporaneous representations or understanding not explicitly contained in this written
15 Agreement, whether written or oral, are of no further legal or equitable force or effect.

16
17 6. The parties agree that it is appropriate to resolve and settle, on the terms set forth in this
18 Settlement Agreement, all of the claims asserted by Plaintiffs in this action, without admission of
19 liability on the part of Defendants, and without admission by Plaintiffs of the validity of any
20 defenses to their claims. This settlement does not represent an admission by Defendants as to the
21 validity of legal claims raised by Plaintiffs. This Agreement does not bar Plaintiffs from
22 challenging, on all grounds, a decision by the Forest Service to approve any future timber sales
23 or other projects within the Power Fire Area or the Freds Fire Area.

24
25 7. Nothing in this Agreement shall be construed or offered in evidence in any proceeding as
26 an admission or concession of wrongdoing, liability, or any issue of fact or law concerning the
27 claims settled under this Agreement. Defendants do not hereby waive any defenses they may
28 have concerning the claims settled under this Agreement, the claims remaining to be litigated in
this action, or any future claims brought by Plaintiffs against projects in the Power Fire or Freds

1 Fire project areas. This Agreement is executed solely for the purpose of compromising and
2 settling the claims pertaining to these two projects and nothing herein shall be construed as
3 precedent in any other context.
4

5 8. Plaintiffs dismiss with prejudice their Complaint for Declaratory and Injunctive Relief
6 subject to this Court retaining jurisdiction over this matter for the sole purpose of enforcing the
7 terms of this Agreement.
8

9 9. Upon entry of the Order, Plaintiffs' bond of \$1000 posted to the District Court on
10 September 1, 2006 shall be refunded.
11

12 10. The terms of this Agreement shall become effective upon approval by the Court of the
13 stipulation of dismissal.
14

15 Dated this 10th day of September, 2007.

16 Respectfully Submitted,

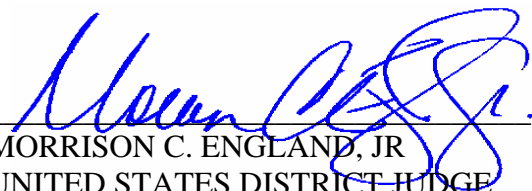
17 By: s/ Rachel M. Fazio.
18 Rachel M. Fazio
19 Attorney for Plaintiffs
20 Earth Island Institute and Center for
21 Biological Diversity

22 By: /s/ Stacey Bosshardt (as authorized 9/04/07)
23 Stacey Bosshardt
24 Attorney for Defendants
25 United States Forest Service,
26 Abigail R. Kimbell, in her official capacity
27 as Chief of the United States Forest Service,
28 and, Ramiro Villalvazo, in his capacity as
Forest Supervisor for Eldorado National
Forest

ORDER

Based on the foregoing settlement agreement of the parties, and for good cause shown,
the above stipulation to dismiss is hereby approved and it is so ordered.

DATED: September 12, 2007



MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2007, I electronically filed the foregoing, with attached Exhibit A, with the clerk of the Court using the CM/ECF system, thus effecting service on all parties pursuant to Local Rule 5-135(a).

By: /s/ Rachel M. Fazio
Rachel M. Fazio
Attorney for Plaintiffs
Earth Island Institute and Center for
Biological Diversity