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13 Attorneys for Plaintiffs

14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF MONTANA**
16 **MISSOULA DIVISION**

17 ALLIANCE FOR THE WILD
18 ROCKIES,

19 Plaintiff,

20 vs.

21 PAUL BRADFORD, Supervisor of the
22 Kootenai National Forest, JANE
23 COTTRELL, Acting Regional Forester
24 of Region One of the U.S. Forest
25 Service, UNITED STATES FOREST
26 SERVICE, an agency of the U.S.
27 Department of Agriculture, and
28 UNITED STATES FISH & WILDLIFE
SERVICE, an agency of the U.S.
Department of Interior,
Defendants.

CV-

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

I. INTRODUCTION

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3 1. This is a civil action for judicial review under the citizen suit provision of
4 the Endangered Species Act of the U.S. Forest Service’s Records of
5 Decision approving the Grizzly Vegetation and Transportation Management
6 Project (Grizzly Project) and the Miller West Fisher Project, and the U.S.
7 Fish & Wildlife Service’s letters of concurrence for the same. This is also a
8 civil action for judicial review under the Administrative Procedure Act of
9 the above-noted decisions as well as the Decision Notice/Finding of No
10 Significant Impact for the Little Beaver Hazardous Fuels Reduction Project
11 (Little Beaver Project).
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- 15 2. Plaintiff Alliance for the Wild Rockies attests that the decisions approving
16 the Grizzly, Miller West Fisher, and Little Beaver Projects (collectively
17 Projects) and letters of concurrence for the Grizzly and Miller West Fisher
18 Projects are arbitrary and capricious, an abuse of discretion, and/or
19 otherwise not in accordance with law.
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- 22 3. Collectively, the Projects authorize the construction of over 14 miles of new
23 roads (permanent and temporary) in occupied habitat for the *de facto*
24 endangered Cabinet-Yaak grizzly bear. The Projects also authorize the
25 reconstruction of 2.4 miles of roads, the temporary re-opening of 5 miles of
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1 closed roads, and the permanent re-opening of 3.5 miles of road in occupied
2 grizzly bear habitat. The Projects further authorize 3,988 acres of
3 commercial logging in occupied grizzly bear habitat.
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5 4. Defendants' approvals of the Projects as written are a violation of the
6 National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*, the
7 National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, the
8 Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, and the
9 Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*
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12 5. Plaintiff requests that the Court set aside the decisions and/or letters of
13 concurrence approving the Projects, pursuant to 5 U.S.C. § 706(2)(A) and
14 16 U.S.C. § 1540(g), and that the Court enjoin the U.S. Forest Service from
15 implementing these Projects.
16

17
18 6. Plaintiff seeks a declaratory judgment, injunctive relief, the award of costs
19 of suit, including attorney and expert witness fees pursuant to the Equal
20 Access to Justice Act, 28 U.S.C. § 2412, and the Endangered Species Act,
21 16 U.S.C. § 1540(g)(4), and such other relief as this Court deems just and
22 proper.
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II. JURISDICTION

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3 7. This action arises under the laws of the United States and involves the
4 United States as a Defendant. Therefore, this Court has subject matter
5 jurisdiction over the claims specified in this Complaint pursuant to 28
6 U.S.C. §§ 1331, 1346.

7
8 8. An actual controversy exists between Plaintiff and Defendants. Plaintiff's
9 members use and enjoy the Kootenai National Forest for hiking, fishing,
10 hunting, camping, photographing scenery and wildlife, and engaging in
11 other vocational, scientific, spiritual, and recreational activities. Plaintiff's
12 members intend to continue to use and enjoy the area frequently and on an
13 ongoing basis in the future.

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16 9. The aesthetic, recreational, scientific, spiritual, and educational interests of
17 Plaintiff's members have been and will be adversely affected and
18 irreparably injured if Defendants implement the Projects. These are actual,
19 concrete injuries caused by Defendants' failure to comply with mandatory
20 duties under NFMA, NEPA, ESA, and the APA. The requested relief would
21 redress these injuries and this Court has the authority to grant Plaintiff's
22 requested relief under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 &
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24
25
26 706.

1 10. Plaintiff submitted timely written comments concerning the Projects and
2 fully participated in the available administrative review and appeal
3 processes, thus it has exhausted administrative remedies. Defendants'
4 denials of Plaintiff's administrative appeals for the Grizzly and Miller West
5 Fisher Project, and Defendants' publication of the Decision Notice/Finding
6 of No Significant Impact for the Little Beaver Project, were the final
7 administrative actions of the U.S. Department of Agriculture Forest Service.
8 Thus, the challenged decisions are final and subject to this Court's review
9 under the APA, 5 U.S.C. §§ 702, 704, and 706.
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11

12 **III. VENUE**

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15 11. Venue in this case is proper under 28 U.S.C. § 1391(e) and LR 3.3(a)(1).
16 Defendants Bradford and Cottrell, both officers of the U.S. Forest Service,
17 reside within the Missoula Division of the United States District Court for
18 the District of Montana.
19
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21 **IV. PARTIES**

22 12. Plaintiff ALLIANCE FOR THE WILD ROCKIES (Alliance) is a tax-
23 exempt, non-profit public interest organization dedicated to the protection
24 and preservation of the native biodiversity of the Northern Rockies
25 Bioregion, its native plant, fish, and animal life, and its naturally
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27

1 functioning ecosystems. Its registered office is located in Helena, Montana.
2
3 The Alliance has over 2,000 individual members, including members who
4 reside on private land within or close to the Kootenai National Forest, and
5 more than 600 member businesses and organizations, many of which are
6 located in Montana. Members of the Alliance work as fishing guides,
7 outfitters, and researchers, who observe, enjoy, and appreciate Montana's
8 native wildlife, water quality, and terrestrial habitat quality, and expect to
9 continue to do so in the future, including in the Project area. Alliance's
10 members' professional and recreational activities are directly affected by
11 Defendants' failure to perform their lawful duty to protect and conserve
12 these ecosystems by approving the challenged Projects.
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16 13. Defendant PAUL BRADFORD is the Supervisor for the Kootenai National
17 Forest, and in that capacity is charged with responsibility for insuring that
18 decisions made at the District level in the Kootenai National Forest are
19 consistent with applicable laws, regulations, and official policies and
20 procedures.
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23 14. Defendant JANE COTTRELL is the Acting Regional Forester for the
24 Northern Region of the U.S. Forest Service, and in that capacity is charged
25 with ultimate responsibility for insuring that decisions made at the National
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1 Forest level in the Northern Region are consistent with applicable laws,
2 regulations, and official policies and procedures.
3

4 15. Defendant UNITED STATES FOREST SERVICE (USFS) is an
5 administrative agency within the U.S. Department of Agriculture, and is
6 responsible for the lawful management of our National Forests, including
7 the Kootenai National Forest.
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9 16. Defendant UNITED STATES FISH & WILDLIFE SERVICE (USFWS) is
10 an administrative agency within the Department of Interior, and is
11 responsible for the lawful management of wildlife species listed under the
12 ESA, including the ESA-listed Cabinet-Yaak grizzly bear.
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15 **V. PROCEDURAL BACKGROUND**

16 17. GRIZZLY PROJECT. On April 17, 2009 Defendant U.S. Fish & Wildlife
17 Service signed a letter of concurrence that the Grizzly Project would not
18 likely adversely affect the Cabinet-Yaak grizzly bear. On April 24, 2009,
19 Defendant Bradford signed the Record of Decision authorizing the Grizzly
20 Project. On June 11, 2009, Plaintiff filed a timely administrative appeal of
21 the decision. On July 27, 2009, the appeal was denied by Defendant
22 Cottrell, constituting the final administrative action. On September 9, 2009,
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1 Plaintiff sent Defendants a 60 day notice of intent to sue under the
2 Endangered Species Act.
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4 18. MILLER WEST FISHER PROJECT. On June 5, 2009, Defendant U.S.
5 Fish & Wildlife Service signed a letter of concurrence that the Miller West
6 Fisher Project would not likely adversely affect the Cabinet-Yaak grizzly
7 bear. On June 8, 2009, Defendant Bradford signed the Record of Decision
8 authorizing the Miller West Fisher Project. On July 27, 2009, Plaintiff filed
9 a timely administrative appeal of the decision. On September 10, 2009, the
10 appeal was denied by Defendant Cottrell's office, constituting the final
11 administrative action. On September 9, 2009, Plaintiff sent Defendants a 60
12 day notice of intent to sue under the Endangered Species Act.
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16 19. LITTLE BEAVER PROJECT. On June 22, 2009, Plaintiff filed an
17 objection to the draft Environmental Assessment for the Little Beaver
18 Project. On August 11, 2009, Defendant Bradford signed the Decision
19 Notice approving the Little Beaver Project and no further administrative
20 appeal was permitted.
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1 **VI. FACTUAL BACKGROUND**

2 **A. Habitat and Status of the Cabinet-Yaak Grizzly Bear**

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4 20. Before European settlement of the American West, grizzly bears (*Ursus*
5 *arctos horribilis*) roamed west from the Great Plains to the California coast,
6 and south to Texas and Mexico, inhabiting almost every conceivable
7 habitat.

8
9 21. With westward expansion, grizzlies were “shot, poisoned, and trapped
10 wherever they were found.” 72 Fed. Reg. 14, 866, 14,868 (Mar. 29, 2007).

11
12 22. Humans settlers eliminated these bears from almost everywhere in the
13 coterminous United States, with the exception of five areas in mountainous
14 regions, national parks, and wilderness areas of Washington, Idaho,
15 Montana, and Wyoming.

16
17 23. Once over 50,000 strong in the lower 48 states, grizzlies were reduced to
18 less than 1,000 bears. Grizzly bears were eliminated from Texas by 1890,
19 from California by 1922, from Utah by 1923, from Oregon by 1931, from
20 New Mexico by 1933, and from Arizona by 1935.

21
22 24. Thus, in a historical blink of an eye, from the 1800s to the early 1900s,
23 humans reduced the range of the grizzly bear to less than 2% of its former
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1 range south of Canada, limiting the bear to a few isolated populations in
2 remnant wildlands.

3
4 25. One of these remnant and isolated grizzly bear populations is found in the
5 Cabinet-Yaak Ecosystem of northwestern Montana and northern Idaho.

6
7 26. The Cabinet-Yaak Ecosystem is composed of two distinct geographic areas
8 bisected by the Kootenai River: the Cabinet Mountains lie to the south of
9 the Kootenai River, and the Yaak River drainage lies to the north.

10
11 27. The region experiences a unique Pacific maritime climate, despite its
12 mountainous, inland location: there are warm summers, as well as wet
13 winters with heavy snowfall. The landscape alternates from rugged, alpine
14 glaciated peaks, to dense coniferous forests, to lush meadows and riparian
15 areas along the meandering Yaak River.

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18 28. Stand-replacing wildfires are a natural occurrence here, and they have
19 created a mosaic of dense forest interspersed with openings of huckleberry
20 shrubfields.

21
22 29. The majority of the Cabinet-Yaak Ecosystem – 90% – is National Forest
23 land, managed by the Forest Service. In particular, 70% of the Cabinet-Yaak
24 Ecosystem is managed by the Kootenai National Forest.
25

1 30. The grizzly bear's natural characteristics make it particularly vulnerable to
2 human persecution: grizzlies are hard to grow, but easy to kill. Due to their
3 late age at first reproduction, small litter sizes, and the long interval between
4 litters, grizzlies have one of the slowest reproductive rates of North
5 American mammals. As the Wildlife Service has stated: "at best [a female
6 grizzly] can replace herself with one breeding age female in the first decade
7 of her life."
8

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11 31. Grizzly bear cubs stay with their mother for two to three years, learning
12 about finding food and survival in the wild, before they disperse to establish
13 their own home range.
14

15 32. Grizzlies have extraordinarily large home ranges of hundreds of square
16 miles, and the bears are capable of traveling over 60 miles at a time.
17

18 33. Within these large home ranges grizzlies require "some level of safety from
19 human depredation and competitive use of habitat that includes roading,
20 logging, mining, human settlement, grazing, and recreation."
21

22 34. In particular, the Wildlife Service cautions that "[r]oads probably pose the
23 most imminent threat to grizzly habitat today []."
24

25 35. The Forest Service estimates that 69% of grizzly bear mortalities are caused
26 by humans. Roads literally pave the way for these mortalities; they provide
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1 humans with access into grizzly bear habitat, which leads to direct mortality
2 through illegal shootings, and to indirect mortality through habituation.
3

4 36. In 1975, the Wildlife Service listed grizzly bears in the lower 48 states as a
5 "threatened" species under the ESA. The Wildlife Service found that the
6 grizzly bear needed to be listed under the ESA for essentially three
7 substantive reasons. The first reason was that land development had reduced
8 the bear's range to isolated populations. The second reason was that bears
9 were subject to mortality from humans due to the increased number of
10 logging access roads, as well as trail construction, that put humans in
11 formerly inaccessible areas of the bear's habitat. The third reason for listing
12 was that bears were subject to mortality due to the tendency of ranchers to
13 shoot bears to protect livestock grazing on National Forests.
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18 37. The Wildlife Service approved a Grizzly Bear Recovery Plan in 1982 and
19 revised the Plan in 1993.
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21 38. The 1993 Recovery Plan established four recovery zones, including the
22 Cabinet- Yaak Ecosystem.
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24 39. In 1993, and again in 1998 and 1999, the Wildlife Service re-visited its
25 decision to list all of the lower 48 grizzly bear populations as "threatened."
26

27 It concluded every time that the Cabinet-Yaak grizzly population had
28

1 deteriorated to the point of warranting an “endangered” classification
2 because “protective measures have not achieved desired goals for habitat
3 protection”
4

5 40. The Wildlife Service stated that the Cabinet-Yaak population was “in
6 danger of extinction” due in part to the cumulative impacts of timber harvest
7 and its associated road construction.
8

9 41. Since the Wildlife Service’s 1999 decision that the Cabinet-Yaak grizzly
10 bear was *de facto* endangered, the agency’s predictions regarding the bear’s
11 survival have become increasingly bleak. The Cabinet-Yaak population is
12 small – estimated at around 45 bears. In 2004, the Wildlife Service
13 estimated that there was a 75% probability that the population was
14 declining. By 2008, the probability that the population is declining has
15 increased to over 90%. Other scientific researchers concur that the
16 population is declining.
17

18 42. In addition to the virtual certainty that the population is decreasing, the
19 Wildlife Service has also found that the human-caused mortality rate is
20 increasing – from 0.71 bear mortalities per year between 1983 and 1998, to
21 2.11 bear mortalities per year between 1999 and 2007.
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1 43. The Cabinet-Yaak population failed all recovery targets between 2002 and
2 2007: it failed the goal for number of females with cubs; it exceeded the
3 limits for human-caused mortality; and it failed the goal for distribution of
4 females with young.
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7 44. Over the past two decades, dozens of bears have been killed by humans. The
8 Wildlife Service assumes that these recorded deaths paint only a partial
9 picture: “[u]nknown, unreported, human-caused mortality occurs each year
10 at some level.” Indeed, the agency’s best estimate is that “known human
11 caused mortality may represent only 50 percent of total human caused
12 mortality in the northern grizzly bear recovery zones.”
13
14

15 **B. Management History of the Cabinet-Yaak Grizzly Bear**

16 45. As noted above, the Kootenai National Forest manages 70% of the Cabinet-
17 Yaak Ecosystem.
18

19 46. The designated “Recovery Zone” for the grizzly bear in the Cabinet-Yaak
20 Ecosystem is divided into bear management units (“BMUs”). 15 of the 22
21 BMUs in the Cabinet-Yaak Ecosystem are managed by the Kootenai
22 National Forest.
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25 47. During preparation of the 1987 Kootenai National Forest Land and
26 Resource Management Plan (“Forest Plan”), the Forest Service
27

1 acknowledged that timber harvest and associated activities could have a
2 negative cumulative impact on grizzly bears: “[a]lthough individual uses
3 may be well planned and not affect the grizzly bear or its habitat, the
4 combined effect of several activities (over time and space) may be
5 negative.”
6
7

8 48. Indeed, the Wildlife Service found that the original Forest Plan proposal
9 would jeopardize the survival of the Cabinet-Yaak grizzly bear, thus the
10 final Forest Plan included standards from the Interagency Grizzly Bear
11 Committee (“IGBC”) to avoid causing jeopardy to the bears.
12

13 49. The final version of the 1987 Forest Plan set forth a Forest-wide standard to
14 apply the “Kootenai Grizzly Management Situation Guidelines (Appendix
15 8)” to all projects impacting grizzly bear habitat. Forest Plan Appendix 8
16 mandates that “management decisions will favor the needs of the grizzly”
17 and that “[g]rizzly/ human conflicts will be resolved in favor of the
18 grizzlies” when an activity is proposed on “Management Situation 1” lands.
19
20 Additionally, the Forest Plan prohibits open road density (“ORD”) above
21 0.75 miles of road per square mile of Forest in each Bear Analysis Area
22 (“BAA”), which are sub-units of BMUs.
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1 50. In 1995, the Wildlife Service published a Biological Opinion and Incidental
2 Take Statement (1995 ITS) for the 1987 Kootenai Forest Plan. The 1995
3 ITS stated that “the [Wildlife] Service believes incidental take has and will
4 occur from [] the effects of implementing the Forest Plan in its original form
5” This opinion was based in part on recent guidance from the IGBC.
6
7 The 1995 ITS then stated that although there was a “take” of the grizzly
8 bear there, would be no “jeopardy” to the bear’s survival if the Forest
9 Service followed the new terms of incidental take statement.
10
11

12 51. The terms of the incidental take statement were that the Forest Service
13 would eventually implement Forest-wide standards adopting IGBC
14 recommendations on limits on the percentage of open motorized route
15 density over one mile of road per square mile of Forest (“OMRD”), total
16 motorized route density over two miles of road per square mile of Forest
17 (“TMRD”), and core habitat. In the interim period, the Forest Service would
18 adhere to the following terms: (1) no increase in ORD above the Forest Plan
19 standard of 0.75; (2) no increase in open motorized trail density; (3) no
20 increase in net TMRD; and (4) no decrease in existing amount of core area.
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25 52. The conclusion that adherence to these terms would avoid jeopardy to the
26 survival of the grizzly bear was in part based upon available evidence that
27

1 the Cabinet-Yaak population was increasing, bears were reproducing, and
2 the mortality rate was decreasing.

3
4 53. Three years later, the Selkirk/Cabinet-Yaak Grizzly Bear Subcommittee of
5 the IGBC adopted what it called the “Interim Access Management Rule Set”
6 (1998 Rule Set). The 1998 Rule Set required the following: (1) strive to
7 provide a minimum of 70 percent habitat effectiveness (security) in each
8 Bear Management Unit (BMU); (2) no net loss of existing core habitat in
9 Priority 1, 2, and 3 BMUs; (3) work to achieve 55% core habitat; (4) no net
10 increase in OMRD; and (5) no net increase in TMRD.

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14 54. The 1998 Rule Set did not adopt numeric thresholds for OMRD or TMRD,
15 minimum sizes for core habitat blocks, or minimum durations for the
16 protection of core habitat blocks.

17
18 55. The Forest Service adopted the 1998 Rule Set without initiating ESA §7
19 consultation with the Wildlife Service.

20
21 56. On January 24, 2000, Plaintiff filed a complaint in the U.S. District Court
22 for the District of Montana, in part to challenge the fact that the 1998 Rule
23 Set did not undergo ESA §7 consultation, and to force the Forest Service to
24 adopt Forest-wide standards for road density on the Kootenai National
25 Forest, as envisioned and ordered by the 1995 ITS. *Alliance for the Wild*
26
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1 *Rockies v. Powell*, CV 00-13-M-DWM, Amended Complaint (D. Mont.
2 March 2, 2000).

3
4 57. In a settlement agreement approved by the district court on March 25, 2001,
5 the Forest Service agreed, among other things, to address Forest-wide
6 grizzly bear access management by completing “Access Management
7 Amendments” for the Forest Plan, and to consult with the Wildlife Service
8 on those Access Management Amendments pursuant to §7 of the ESA.
9

10
11 58. In March 2002, the Forest Service completed the Final EIS for the Access
12 Management Amendments. On February 9, 2004, the Wildlife Service
13 issued a Biological Opinion and Incidental Take Statement for the Access
14 Management Amendments. In March 2004, the Forest Service published a
15 Record of Decision approving the Access Management Amendments.
16

17
18 59. The Access Management Amendments set standards loosely derived from a
19 research report produced in 1997 by Idaho Fish & Game Department
20 Biologist Wayne Wakkinen and Wildlife Service biologist Wayne Kasworm
21 (1997 Wakkinen Study). Wakkinen and Kasworm collected research data
22 from six radio-collared grizzly bears in the Selkirk and Cabinet- Yaak
23 Ecosystems to determine the maximum levels of open and total route
24 density, and minimum level of core habitat, that grizzly bears could tolerate.
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1 60. The study found that the common denominators that all six bears tolerated
2 were 72% core habitat, 17% OMRD, and 14% TMRD.
3

4 61. The authors noted that a minimum core size was probably between two
5 square miles and eight square miles.
6

7 62. After the study was completed, two of the six bears (one-third of the study
8 population) were killed.
9

10 63. The average of the densities tolerated by the bears were 55% core habitat,
11 33 % OMRD, and 26% TMRD. These are the numbers the agencies chose
12 to use as the basic Forest-wide habitat standards for the Cabinet-Yaak
13 grizzly bear in the Access Management Amendments.
14

15 64. Conservation groups disagreed that standards derived from the averages in
16 the 1997 Wakkinen Study were sufficient to conserve and recover the
17 Cabinet-Yaak grizzly bear, and they filed suit to challenged the adoption of
18 the standards. *Cabinet Resource Group v. U.S. Fish and Wildlife Service*,
19 465 F.Supp.2d 1067 (D. Mont. 2006). The groups argued that the habitat
20 parameters measured in the Wakkinen study merely reflect the bears'
21 selection of the best habitat available on an already degraded landscape
22 where the bear population is already heading toward extinction, thus the
23 averages of those parameters are not adequate to recover the bear
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1 population. Moreover, in light of the fact that the habitat conditions proved
2 lethal to one-third of the study population and that one bear reached full
3 adulthood during the study, reliance on those averages was further
4 misplaced.
5

6
7 65. Some Wildlife Service biologists also had expressed reservations about the
8 Wakkinen's study's findings as a result of these shortcomings. Two
9 biologists who commented on a draft of the Wakkinen study in 1996 stated:
10

11 We remain concerned that we are studying bears and drawing
12 conclusions from their use in an already degraded environment.
13 Are we developing habitat-use conclusions from grizzly bears
14 that are just barely getting by? Or are the grizzly bears thriving
15 and successfully reproducing in the study areas? You state in
16 the discussion that survival and reproduction success must be
17 considered when selecting animals to use as the basis for
18 standards-we support this and recommend including additional
19 information on this topic. If the grizzly bears are not thriving in
20 the existing environmental baseline, we may need to develop
21 open road densities, total road densities, and core standards that
22 are more conservative than would be indicated by this study.

23
24 66. Again in 1998, when Wakkinen's 33% OMRD, 26% TMRD, and 55% core
25 habitat standards were before the IGBC's Cabinet-Yaak/Selkirk
26 Subcommittee as proposed standards for access management, a biologist in
27 the Fish & Wildlife Service's Spokane office questioned the adequacy of the
28 Wakkinen parameters:

1 This office has never concurred with the minimum 55% core
2 suggested by the SE/CYE Access Task Group. The best
3 available and most defensible scientific information available
4 on the core security needs of female grizzly bear comes from
5 the combined data sets: SE-CYE, 55% core (n=6) and the
6 NCDE 68% core (n=8), arithmetic mean of 61.5% core (n=14).
7 Accordingly, we propose a long-term strategy based on 61.5%
8 core with concomitant reductions in open road density and total
9 road density.

10 67. A Telephone Conversation Record of a conference call among Fish &
11 Wildlife Service biologists on March 22, 2001 suggested that the authors of
12 the 2004 Biological Opinion initially disregarded the Wakkinen study in
13 favor of a more protective standard that they deemed more accurate, but that
14 they were overruled by superiors within the agency. The Telephone
15 Conversation Record stated:

16 I also reminded Carole that when we first started writing this
17 BO [biological opinion], we suggested managing for criteria
18 that is greater than the "Waynes" numbers because of our
19 concern with data size, better applicable data sets on female
20 home ranges from the [Northern Continental Divide
21 Ecosystem], etc. However, we were told by Helena that any BO
22 requiring standards in excess of the "Waynes" numbers would
23 not be supported, and Chris Servheen in fact, stated that he
24 would go directly to our Regional Director and recommend that
25 she not support such a BO.

26 68. Although the district court eventually concluded that the standards satisfied
27 the ESA, the court set aside adoption of the Access Management
28

1 Amendments as a violation of the National Environmental Policy Act
2 (“NEPA”) for failing to address the flaws in the Wakkinen Study. More
3 specifically, the agencies failed to address the significance of the fact that
4 the bears may have been simply choosing the best available habitat on a
5 degraded landscape and that hypothesis could not be tested unless the
6 conditions were studied in comparison to the larger landscape area. The
7 Court concluded:
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11 Given the statements of the Wakkinen authors, the misgivings
12 of other biologists about the range of habitat choices available
13 to the bears, and the ongoing mortality problems in these
14 populations, there can be no ...accurate prediction of the impact
15 of the proposed action until the Forest Service has assessed the
16 importance of the missing information.

17 ...

18 The [new] analysis [upon remand] must acknowledge that the
19 Wakkinen study's authors were unsure whether the bears they
20 studied had chosen optimal habitat or whether they simply
21 chose the best habitat available from a degraded landscape. The
22 analysis must assess the relevance and importance of this flaw
23 in the Wakkinen study. In so doing, the analysis must take into
24 account the misgivings of Fish & Wildlife Service biologists
25 over the 33/26/55 standard, the findings of other studies
26 measuring habitat parameters in other ecosystems, and the state
27 of grizzly bear mortality in the Cabinet-Yaak and Selkirk
28 Recovery Zones.

1 69. On May 17, 2007, the Wildlife Service withdrew the Biological Opinion it
2 had issued for the EIS that was set aside by the district court's opinion.
3

4 70. After the district court set aside the Access Management Amendments, the
5 Forest Service produced an internal memorandum in 2006 that it referred to
6 as the "interim rule set" for grizzly bear management.
7

8 71. The Forest Service stated that the interim rule set standards were derived
9 from the 1987 Kootenai Forest Plan, consultations since 1987, the 1995
10 ITS, and the 1998 Rule Set.
11

12 72. The standards require (1) habitat effectiveness greater than or equal to 70%;
13 (2) ORD less than or equal to 0.75 miles/square mile, which is measured by
14 taking the average of all BAAs within a BMU; (3) no net increase in
15 OMRD; (4) no net increase in TMRD; (5) no net decrease in core area; (6)
16 work to achieve 55% core, and (7) no increase in existing open motorized
17 trail density.
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21 73. The Forest Service did not conduct ESA § 7 consultation for the interim rule
22 set.
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1 **C. Analysis for the Grizzly, Miller West Fisher, and Little Beaver Projects**

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3 74. The Wildlife Service has declared that “[i]f human related disturbances such
4 as road use or timber harvest continue in preferred habitats for extended
5 periods of time, historical bear use of the area may be lost”

6
7 75. The 1993 Grizzly Bear Recovery Plan stated that “at some point in time,
8 probably associated with the degree of stress, grizzly bears will no longer
9 use certain portions of their former range. Therefore, each new action has
10 the potential of being ‘the last straw’ from the standpoint of the bear”

11
12 76. The Wildlife Service has noted the detrimental effects of logging in
13 particular:
14

15 Timber management programs may negatively affect grizzly
16 bears by (1) removing thermal, resting, and security cover; (2)
17 displacement from habitat during the logging period; and (3)
18 increases in human/ grizzly bear confrontation potential or
19 disturbance factors as a result of road building and
20 management. New roads into formerly unroaded areas may
cause bears to abandon the area.

21 77. Moreover, the Wildlife Service concluded over 14 years ago that “high open
22 and total road densities in [some] areas [of the Forest] are impairing
23 essential behavioral patterns, increasing mortality risk, and resulting in
24 significantly less use of habitat than expected”
25

1 78. Instead of refraining from logging and road-building in occupied grizzly
2 bear habitat until the bear shows signs of recovery or at least stabilization,
3 the Forest Service has just concurrently approved three more road-building
4 and commercial logging project in occupied bear habitat: the Grizzly, Miller
5 West Fisher, and Little Beaver Projects.
6

7
8 **1. Grizzly Project**

9 79. The Grizzly Project is located within BMUs 11 and 14 in the Cabinet-Yaak
10 Recovery Zone.

11 80. The Grizzly Project authorizes 907 acres of commercial logging, the
12 construction of 3.2 miles of new temporary road, the temporary re-opening
13 of five miles of restricted roads, and the permanent re-opening of 3.5 miles
14 of road to public access.

15 81. The Grizzly Project also authorizes road decommissioning, but the Forest
16 Service admits that funding is not secure for road decommissioning and
17 states that “[t]he restoration actions that are proposed are not designed to
18 balance out the impacts of the proposed actions. They are proposed as
19 opportunities to pursue, if funding is available.”

20 82. Despite their statement that road decommissioning is “not intended to
21 balance out the impacts” of the Grizzly Project, the Forest Service
22 nonetheless analyzed the impacts of the Grizzly Project as if funding were
23 guaranteed for all road decommissioning activities. If funding is not
24 available for road decommissioning, the Grizzly Project will permanently
25 decrease core habitat and permanently increase both total motorized route
26 density and open motorized route density.
27

- 1 83. Assuming that all road decommissioning will be funded, the Grizzly Project
2 will still result in a temporary (four to five year) decrease in the existing
3 amount of core area in the Grizzly Project area. In BMU 14, the Grizzly
4 Project will reduce the existing amount of core from 56% to 55% during
5 implementation. In BMU 11, the Grizzly Project will “temporarily affect”
6 280 acres of core, which implies that core will “temporarily” decrease by
7 280 acres.
- 8 84. The Grizzly Project did not set a minimum size or duration for each core
9 area.
- 10 85. The Grizzly Project will cause a temporary (four to five year) increase in the
11 percentage of the area with an open motorized route density over one mile
12 road/square mile (OMRD) in both BMUs. In BMU 11, 28% of the area
13 already has over one mile of open road & motorized trail per square mile,
14 and during the Project 31-32% of the area will have over one mile of open
15 road & motorized trail per square mile. In BMU 14, 28% of the area already
16 has over one mile of open road & motorized trail per square mile, and
17 during the Project 29% of the area will have over one mile of open road &
18 motorized trail per square mile.
- 19 86. The Forest Service does not disclose ORD at the BAA level, thus it is
20 impossible to determine compliance with the 1995 ITS. At least some of the
21 BAAs must already exceed 0.75 miles of open road per square mile if
22 almost one-third of each BMU already has over 1.00 miles of open road &
23 motorized trail per square mile. The temporary or permanent increase of
24 11.7 miles of open roads in the Project area will increase ORD in at least
25 some BAAs. Thus, increases in BAAs that already exceed 0.75
26 miles/square mile are likely.
- 27

1 87. The Forest Service admits that “[g]rizzly bears may be disturbed or
2 temporarily displaced from project activities” authorized by the Grizzly
3 Project.

4 **2. Miller West Fisher Project**

5 87. The Miller West Fisher Project is located within BMUs 6 and 7 in the
6 Cabinet-Yaak Recovery Zone and within the Cabinet Face BORZ..

7 88. The Miller West Fisher Project authorizes 1,896 acres of commercial
8 logging, including helicopter logging, and the construction of 3.29 miles of
9 new temporary road.

10 89. These activities will result in ORD levels in several BAAs that increase
11 above 0.75 miles road/square mile. During Alternative 6, subdivision A
12 activities, the Project alone will increase ORD in BAA 566 from 0.54 to
13 1.05. When the effects of these activities are added to other simultaneous
14 effects from other activities, ORD will also increase during Project
15 implementation in BAA 565 from 0.24 to 1.40, in BAA 566 from 1.11 to
16 1.44, and in BAA 6-7-4 from 0.55 to 1.08. During other Alternative 6
17 activities, the Project alone will increase ORD in BAA 566 from 1.11 to
18 1.94. When the effects of these activities are added to other simultaneous
19 effects, ORD will increase in BAA 565 from 0.24 to 1.40, in BAA 566 from
20 1.11 to 2.09, and in BAA 6-7-4 from 0.55 to 1.08.

21 90. The Forest Service believes that one effect of increasing open road density
22 in the Recovery Zone via the Miller West Fisher Project will be “short-term
23 disturbance and/or temporary displacement of grizzly bears.”

24 92. Overall, the Forest Service estimates that bears will be displaced from 5,303
25 acres within the Recovery Zone as a result of the Project.

1 93. Within the Cabinet Face BORZ, the linear open road density is already
2 above 0.75 miles/square mile at 2.2 miles/square mile.

3 94. The Miller West Fisher Project will reopen 1.13 miles of road in this area
4 during the multiple years of Project implementation.

5 95. The Forest Service acknowledges that timber harvest in the Cabinet Face
6 BORZ “may displace grizzly bears from the area surrounding [logging]
7 units during the period of activity.” In particular, the Forest Service
8 acknowledges that helicopter logging may displace bears up to one mile.

9 91. The Forest Service estimates that logging activities for the first timber sale
10 will take 2-5 years, and that other timber sales may follow.

11 92. The Miller West Fisher Project does not set a minimum size and duration
12 for each core habitat area.

13 **3. Little Beaver Project**

14 93. The Little Beaver Project is located on the Cabinet Ranger District of the
15 Kootenai National Forest, within the Clark Fork Outside Bear Recovery
16 Zone (BORZ) “recurring use” polygon, an area that is technically not within
17 the administrative boundaries of the “Recovery Zone,” but is directly
18 adjacent to the “Recovery Zone.”

19 94. Grizzly bears repeatedly inhabit and are killed by humans in the Clark Fork
20 BORZ, including two human-caused mortalities last year alone.

21 95. The Forest Service concedes that “based on impacts from roads, incidental
22 take of grizzly bear likely is occurring on those portions of the KNF and
23 IPNF outside the recovery area. The values (higher than those research has
24 shown to impact bears) also show the level of take is higher in these areas
25 than inside the recovery zone, which is being managed specifically for
26
27

1 grizzly (i.e. lower road densities, higher security levels, less overall
2 disturbance).”

3 96. The Little Beaver Project authorizes 1,185 acres of commercial logging,
4 including helicopter logging, and 5.5 miles of new permanent road
5 construction, 2.3 miles of new temporary road construction, and 2.4 miles of
6 road reconstruction.

7 97. The open road density in the area is already 0.9 miles/square mile.

8 98. The Forest Service admits that “during hauling on new or previously closed
9 roads, grizzly bears may be temporarily displaced from approximately 2,265
10 acres.”

11 99. The Forest Service also admits that logging activities “may temporarily
12 displace grizzly bears from approximately 3,269 acres during the period of
13 activity.”

14 VII. CLAIMS FOR RELIEF

15 FIRST CLAIM FOR RELIEF

16
17 The Forest Service’s conclusion, and the Wildlife Service’s concurrence, that the
18 Grizzly and Miller West Fisher Projects are “not likely to adversely affect” the
19 grizzly bear are arbitrary and not based upon the best available science, in
20 violation of Section 7 of the ESA.

21 100. All above paragraphs are incorporated by reference.

22 101. The ESA requires that the Forest Service and Wildlife Service use the best
23 available science when consulting on the likely effect of site-specific
24 actions on National Forests.
25

1 102. The APA requires that the Forest Service and Wildlife Service base their
2 decisions on substantial supporting evidence in the record. Decisions
3 cannot be contrary to the evidence in the record and cannot fail to consider
4 an important factor. There must be a rational connection between the facts
5 in the record and the decision.
6

7
8 103. The ESA requires reconsultation for ongoing actions “if new information
9 reveals effects of the action that may affect listed species . . . in a manner or
10 to an extent not previously considered” in an initial Biological
11 Opinion/Incidental Take Statement.
12

13
14 104. The agencies violate the ESA by approving the Grizzly and Miller West
15 Fisher Project because their “no adverse effect” conclusion is arbitrary and
16 not based upon the best available science.
17

18 105. The agencies’ failure to comply with the 1995 ITS equates to unpermitted
19 take, which is an adverse impact. The Grizzly and Miller West Fisher
20 Projects violate the 1995 ITS by failing to assign and apply a minimum core
21 habitat size and duration (as required by the incorporation of the 1994 IGBC
22 parameters as the best available science), allowing increases in open road
23 density in affected Bear Analysis Areas, and allowing decreases in existing
24 blocks of core habitat.
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1 106. Even if the agencies comply with the 1995 ITS standards, those standards
2 are not based upon the best available science and thus cannot be relied
3 upon. The facts in the record indicate that the ITS premised its no jeopardy
4 conclusion upon the science available at the time that the bear population
5 was increasing and the mortality rate was decreasing. Since that time, the
6 agency's own science has changed and now shows that the bear population
7 is declining to the point of extinction and the mortality rate is increasing.
8 The agency's own available science also shows that implementation of the
9 ITS standards have failed to protect the bear. In light of this significant new
10 information, the agencies cannot rely on compliance with the 1995 ITS;
11 they must reinitiate formal consultation on the 1995 ITS standards.

12 107. Any reliance on the Wakkinen Study averages is also arbitrary because it is
13 irrational to rely on status quo habitat conditions that are causing extinction,
14 and the Wakkinen Study averages do not even preserve the status quo
15 conditions. Preserving a failing status quo is "irreparable harm." The
16 agencies' conclusion that this irreparable harm is not an adverse impact is
17 irrational and thus arbitrary and not based upon the best available science.

18 108. The agencies' conclusion that it does not adversely affect grizzly bears to be
19 continuously "temporarily" displaced from occupied habitat is also arbitrary
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1 and not based upon the best available science. Cumulatively, the Grizzly
2 and Miller West Fisher Projects will cause displacement from thousands of
3 acres of occupied grizzly bear habitat in roughly the same time period,
4 including displacement from helicopter logging authorized by the Miller
5 West Fisher Project. This impact is in addition to all of the other ongoing
6 logging and road use activities occurring concurrently in occupied grizzly
7 habitat. In addition to displacement caused by the logging itself, the
8 opening and closing of roads shifts areas of secure habitat forcing grizzly
9 bears in the area to move elsewhere to find other secure habitat. Continuous
10 displacement over multiple years from occupied habitat meets the definition
11 of “take” under the ESA, and thus must also amount to an “adverse effect”
12 on the grizzly bears. Additionally, the evidence in the record shows that
13 continuous logging activities harm bears and are correlated with an ever-
14 increasing probability of extinction.
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21 **SECOND CLAIM FOR RELIEF**

22 The Grizzly and Miller West Fisher Projects will cause unpermitted “take” of the
23 threatened Cabinet-Yaak grizzly bear and therefore violate Section 9 of the ESA.

24 109. All above paragraphs are incorporated by reference.
25
26
27

1 110. Section 9 of the ESA forbids any individual from “taking” an ESA-listed
2 species. “Take” is defined to include “harass.” “Harass” is defined as an
3 “intentional or negligent act . . . which creates the likelihood of injury to
4 wildlife by annoying it to such an extent as to significantly disrupt normal
5 behavioral patterns which include, but are not limited to, breeding, feeding,
6 or sheltering.”
7

8
9 111. The Forest Service is permitted to cause incidental “take” of grizzly bears in
10 the Cabinet-Yaak Grizzly Bear Recovery Zone in accordance with the terms
11 of the 1995 ITS. If the Forest Service does not comply with those terms, the
12 take is not permitted absent a new formal biological opinion and incidental
13 take statement.
14

15
16 112. The Grizzly and Miller West Fisher Projects cause an unpermitted “take” of
17 the Cabinet-Yaak grizzly bear because they violate the terms of 1995 ITS.
18 The Grizzly and Miller West Fisher Projects fail to assign and apply a
19 minimum core habitat size and duration (as required by the incorporation of
20 the 1994 IGBC parameters as the best available science), allow increases in
21 open road density in affected Bear Analysis Areas, and allow decreases in
22 existing blocks of core habitat.
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1 113. The Grizzly and Miller West Fisher Projects also cause unpermitted take of
2 the Cabinet-Yaak grizzly bear by allowing harassment, in the form of
3 continuous displacement from occupied habitat over multiple years, which
4 significantly disrupts the bears' normal behavioral patterns.
5

6
7 **THIRD CLAIM FOR RELIEF**

8 The approvals of the Grizzly, Miller West Fisher, and Little Beaver Projects
9 violate NEPA because the agencies did not take a hard look at the adequacy of the
10 habitat standards applied.

11 114. All above paragraphs are incorporated by reference.

12 115. NEPA requires that agencies take a hard look at the environmental effects of
13 their actions.
14

15 116. The APA prohibits agencies from making decisions that fail to consider an
16 important factor.
17

18 117. In violation of NEPA and the APA, the agencies fail to consider the
19 important factor of whether the application of the interim rule set standards
20 will facilitate the bear's trend toward extinction in light of the fact that the
21 interim rule set standards weaken the already failing ITS standards.
22

23 118. In violation of NEPA and the APA, the agencies fail to consider the
24 important factor of whether the ITS standards are still valid in light of their
25 admitted failure to conserve the bear population, their correlation instead to
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1 an ever-increasing probability of extinction, and their basis on stale
2 scientific evidence that the bear population was increasing and the mortality
3 rate was decreasing.
4

5 119. In violation of NEPA and the APA, the agencies fail to consider the
6 important factor that the Wakkinen study authors were unsure whether the
7 average standards conserve adequate habitat conditions for bear recovery or
8 simply represent the averages of the best habitat available on a degraded
9 landscape. The agencies also fail to assess the relevance and importance of
10 this flaw in the Wakkinen study. In particular, the agencies failed to
11 acknowledge and discuss the significance of the misgivings of Fish &
12 Wildlife Service biologists over the 33/26/55 standard, the findings of other
13 studies measuring habitat parameters in other ecosystems, and the state of
14 grizzly bear mortality in the Cabinet-Yaak and Selkirk Recovery Zones.
15

16 120. In violation of NEPA and the APA, the agencies fail to consider whether the
17 standards, or lack thereof, applied to occupied grizzly bear habitat outside
18 the Recovery Zone in “BORZ” polygons are adequate in light of the Forest
19 Service’s admission that incidental take is higher in BORZ polygons than in
20 the Recovery Zone.
21

22 121. In light of the failure to acknowledge and discuss these factors, the Forest
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24
25

1 Service must complete a supplemental EIS for both the Projects.

2
3 **FOURTH CLAIM FOR RELIEF**

4 The approvals of the Grizzly, Miller West Fisher, and Little Beaver Projects
5 violate NEPA because the agencies did not consider the cumulative impact of
6 continuously displacing bears from occupied habitat via logging and opening and
7 closing roads and shifting available core habitat.

8 122. All above paragraphs are incorporated by reference.

9 123. NEPA requires that agencies take a hard look at the cumulative
10 environmental effects of their actions. Cumulative environmental impacts
11 result “from the incremental impact of the action when added to other past,
12 present, and reasonably foreseeable future actions” If an action may
13 have a significant cumulative impact, the agency must prepare a full EIS.

14 124. The APA prohibits agencies from making decisions that fail to consider an
15 important factor

16 125. Collectively, the Projects authorize the construction of over 14 miles of new
17 roads (permanent and temporary), the reconstruction of 2.4 miles of roads,
18 the temporary re-opening of 5 miles of closed roads, and the permanent re-
19 opening of 3.5 miles of road in occupied grizzly bear habitat. The Projects
20 further authorize 3,988 acres of commercial logging in occupied grizzly
21 bear habitat, including helicopter logging. The other ongoing road use and
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1 logging projects in occupied grizzly bear habitat are not fully disclosed.

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3 126. None of the decisions for the Projects address the cumulative impact on the
4 Cabinet-Yaak grizzly bear population from continuous displacement from
5 logging in addition to continuous displacement from constantly opening and
6 closing roads and shifting of core habitat blocks in occupied grizzly bear
7 habitat.
8

9
10 127. In particular, the agencies' failure to address the constant shifting of core
11 habitat blocks is critical in light of the agencies' failures to (a) designate a
12 minimum core habitat block size, (b) enforce a minimum 10 year duration
13 for each core habitat block size, and (c) refrain from decreasing existing
14 core habitat blocks, all of which are required by the 1995 ITS.
15

16
17 128. The three challenged Projects will have a significant cumulative impact on
18 the survival of the Cabinet-Yaak grizzly bear population, thus the Forest
19 Service must complete a supplemental EIS for both the Grizzly Project and
20 Miller West Fisher Project, and must complete a full EIS for the Little
21 Beaver Project discussing this cumulative impact.
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FIFTH CLAIM FOR RELIEF

The Forest Service violates the ESA and NEPA by failing to conduct NEPA analysis ESA consultation for its interim rule set.

129. All above paragraphs are incorporated by reference.

130. The approval of management criteria that may affect ESA-listed species, including guidelines for logging and road-building, must undergo both ESA Section 7 consultation and NEPA analysis with notice and public comment.

131. The Forest Service internally published what it called an “interim rule set” to apply to land management activities until the new Access Management Amendments are implemented. The interim rule set, officially titled “Grizzly Bear Analysis Requirements in light of Judge Malloy’s [sic] December 13, 2006 decision to set aside the 2002 FEIS and 2004 ROD for the Access Amendment,” set forth what it called “ANALYSIS REQUIREMENTS” for land management activities in the Cabinet-Yaak Recovery Zone. The interim rule set was applied to the Grizzly and Miller West Fisher Projects.

132. The Forest Service’s failure to conduct Section 7 ESA consultation for the interim rule set violates the ESA.

133. The Forest Service’ failure to conduct a NEPA analysis, with public notice

1 and comment, for the interim rule set violates NEPA.

2
3 **SIXTH CLAIM FOR RELIEF**

4 The Forest Service violates NFMA and NEPA because the Projects allow
5 activities that are not compatible with the needs of the grizzly bear.

6 134. All above paragraphs are incorporated by reference.

7 135. The Kootenai Forest Plan is legally enforceable under NFMA. The
8 Kootenai Forest Plan forbids uses on MS-1 and MS-2 lands unless they are
9 compatible with grizzly bear needs. On MS-1 lands, any conflicts are
10 resolved in favor of the grizzly bear.

11
12
13 136. The Projects violate NEPA because all of the environmental analyses fail to
14 take a hard look and address the important factor of whether the proposed
15 commercial logging and road-building activities are compatible with or
16 conflict with the needs of the grizzly bear.

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18
19 137. The Projects also violate NFMA because all of the evidence in the record
20 indicates that construction of over 14 miles of new roads (permanent and
21 temporary), reconstruction of 2.4 miles of roads, the temporary re-opening
22 of 5 miles of closed roads, the permanent re-opening of 3.5 miles of road,
23 and 3,988 acres of concurrent commercial logging in occupied grizzly bear
24 habitat are not compatible with the needs of this fragile grizzly bear
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1 population that is on the brink of extinction. Additionally, both the Little
2 Beaver Project and Miller West Fisher Project allow helicopter logging,
3 which is also an incompatible use. Thus, the approval of the Projects
4 violate the Kootenai Forest Plan and accordingly violate NFMA.
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9 **VIII. REQUEST FOR RELIEF**

10 **For all of the above-stated reasons, Plaintiff requests that this Court:**

- 11
12
13 A. Declare that the Forest Service’s “not likely to adversely impact” conclusion
14 regarding the grizzly bear, and the Wildlife Service’s concurrence with that
15 conclusion, for the Grizzly Project and Miller West Fisher Project are
16 arbitrary and in violation of the ESA;
17
18 B. Declare that the Grizzly Project and Miller West Fisher Project cause
19 unpermitted take, in violation of the ESA;
20
21 C. Declare that the agencies fail to take a hard look at the adequacy of the
22 habitat standards applied to the Projects, in violation of the APA and NEPA;
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1 D. Declare that the Forest Service’s failure to address the cumulative impact on
2 the Cabinet-Yaak grizzly bear population from continuous displacement
3 from logging and shifting core habitat is arbitrary and in violation of NEPA;
4

5
6 E. Declare that the Forest Service’s failure to conduct a NEPA analysis for the
7 interim rule set violates NEPA;
8

9 F. Declare that the agencies’ failure to conduct ESA consultation for the
10 interim rule set violates ESA;
11

12 G. Declare that the Forest Service’s failure to address whether the commercial
13 logging, including helicopter logging, and road construction, re-
14 construction, and re-opening authorized by the Projects are uses compatible
15 with the needs of the Cabinet-Yaak grizzly bear violates NEPA;
16
17

18 H. Declare that the commercial logging, including helicopter logging, and road
19 construction, re-construction, and re-opening authorized by the Projects are
20 uses that are not compatible with the needs of the Cabinet-Yaak grizzly
21 bear, in violation of NFMA;
22
23

24 I. Enjoin the implementation of the Projects;
25
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27

1 J. Award Plaintiff its costs, expenses, expert witness fees, and reasonable
2 attorney fees under EAJA and the ESA; and
3

4 K. Grant Plaintiff such further relief as may be just, proper, and equitable.
5

6 Respectfully submitted this 16th Day of November, 2009.
7

8 /s/ Rebecca K. Smith

9 Rebecca K. Smith

10 PUBLIC INTEREST DEFENSE CENTER, PC

11 Timothy M. Bechtold

12 BECHTOLD LAW FIRM, PLLC

13 Attorneys for Plaintiffs
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