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

15 NATIVE ECOSYSTEMS COUNCIL,
16 ALLIANCE FOR THE WILD
17 ROCKIES

18 Plaintiffs,

19 vs.

20 LESLIE WELDON, Regional Forester
21 of Region One of the U.S. Forest
22 Service, UNITED STATES FOREST
23 SERVICE, an agency of the U.S.
24 Department of Agriculture, and
25 UNITED STATES FISH & WILDLIFE
26 SERVICE, an agency of the U.S.
27 Department of Interior,
28 Defendants.

CV-

COMPLAINT FOR INJUNCTIVE

AND DECLARATORY RELIEF

1 **I. INTRODUCTION**

- 2
- 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 Decision Notice
- 5 and Finding of No Significant Impact (DN) authorizing implementation of
- 6 the Elliston Face Hazardous Fuels Reduction Project (Project), and the U.S.
- 7 Fish & Wildlife Service’s letter 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.
- 10
- 11
- 12 2. Plaintiffs Alliance for the Wild Rockies and Native Ecosystems Council
- 13 attest that the decisions approving the Project and letter of concurrence are
- 14 arbitrary and capricious, an abuse of discretion, and/or otherwise not in
- 15 accordance with law.
- 16
- 17
- 18 3. Defendants’ approval of the Project as written is a violation of the National
- 19 Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*, the National
- 20 Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, the Endangered
- 21 Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, and the Administrative
- 22 Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*
- 23
- 24
- 25 4. Plaintiffs requests that the Court set aside the decision and/or letter of
- 26 concurrence approving the Project, pursuant to 5 U.S.C. § 706(2)(A) and 16
- 27

1 U.S.C. § 1540(g), and that the Court enjoin the U.S. Forest Service from
2 implementing the Project.
3

- 4 5. Plaintiffs seeks a declaratory judgment, injunctive relief, the award of costs
5 of suit, including attorney and expert witness fees pursuant to the Equal
6 Access to Justice Act, 28 U.S.C. § 2412, and the Endangered Species Act,
7 16 U.S.C. § 1540(g)(4), and such other relief as this Court deems just and
8 proper.
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10

11 **II. JURISDICTION**

- 12 6. This action arises under the laws of the United States and involves the
13 United States as a Defendant. Therefore, this Court has subject matter
14 jurisdiction over the claims specified in this Complaint pursuant to 28
15 U.S.C. §§ 1331, 1346.
16
17

- 18 7. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs'
19 members use and enjoy the Helena National Forest for hiking, fishing,
20 hunting, camping, photographing scenery and wildlife, and engaging in
21 other vocational, scientific, spiritual, and recreational activities. Plaintiffs'
22 members intend to continue to use and enjoy the area frequently and on an
23 ongoing basis in the future.
24
25

- 26 8. The aesthetic, recreational, scientific, spiritual, and educational interests of
27

1 Plaintiffs' members have been and will be adversely affected and
2 irreparably injured if Defendants implement the Projects. These are actual,
3 concrete injuries caused by Defendants' failure to comply with mandatory
4 duties under NFMA, NEPA, ESA, and the APA. The requested relief would
5 redress these injuries and this Court has the authority to grant Plaintiffs'
6 requested relief under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 &
7 706.
8

- 9
10
11 9. Plaintiffs submitted timely written comments concerning the Project and
12 fully participated in the available administrative review and appeal
13 processes, thus it has exhausted administrative remedies. Defendants'
14 denials of Plaintiffs' administrative appeals were the final administrative
15 actions of the U.S. Department of Agriculture Forest Service. Thus, the
16 challenged decision is final and subject to this Court's review under the
17 APA, 5 U.S.C. §§ 702, 704, and 706.
18
19

20 **III. VENUE**

- 21
22 10. Venue in this case is proper under 28 U.S.C. § 1391(e) and LR 3.3(a)(1).
23 Defendant Weldon, an officer of Defendant U.S. Forest Service, resides
24 within the Missoula Division of the United States District Court for the
25 District of Montana.
26
27

1 **IV. PARTIES**

2 11. Plaintiff ALLIANCE FOR THE WILD ROCKIES is a tax-exempt, non-
3 profit public interest organization dedicated to the protection and
4 preservation of the native biodiversity of the Northern Rockies Bioregion,
5 its native plant, fish, and animal life, and its naturally functioning
6 ecosystems. Its registered office is located in Helena, Montana. The
7 Alliance has over 2,000 individual members and more than 600 member
8 businesses and organizations, many of which are located in Montana.
9 Members of the Alliance work as fishing guides, outfitters, and researchers,
10 who observe, enjoy, and appreciate Montana’s native wildlife, water quality,
11 and terrestrial habitat quality, and expect to continue to do so in the future,
12 including in the Project area in the Helena National Forest. Alliance’s
13 members’ professional and recreational activities are directly affected by
14 Defendants’ failure to perform their lawful duty to protect and conserve
15 these ecosystems by approving the challenged Project. Alliance for the
16 Wild Rockies brings this action on its own behalf and on behalf of its
17 adversely affected members.
18

19 12. Plaintiff NATIVE ECOSYSTEMS COUNCIL is a non-profit Montana
20 corporation with its principal place of business in Three Forks, Montana.
21
22
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24

1 Native Ecosystems Council is dedicated to the conservation of natural
2 resources on public lands in the Northern Rockies. Its members use and
3 will continue to use the Helena National Forest for work and for outdoor
4 recreation of all kinds, including fishing, hunting, hiking, horseback riding,
5 and cross-country skiing. The Forest Service's unlawful actions adversely
6 affect Native Ecosystems Council's organizational interests, as well as its
7 members' use and enjoyment of the Helena National Forest, including the
8 Project area. Native Ecosystems Council brings this action on its own
9 behalf and on behalf of its adversely affected members.
10

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13
14 13. Defendant LESLIE WELDON is the Regional Forester for the Northern
15 Region of the U.S. Forest Service, and in that capacity is charged with
16 ultimate responsibility for ensuring that decisions made at the National
17 Forest level in the Northern Region, including the Helena National Forest,
18 are consistent with applicable laws, regulations, and official policies and
19 procedures.
20

21
22 14. Defendant UNITED STATES FOREST SERVICE (Forest Service) is an
23 administrative agency within the U.S. Department of Agriculture, and is
24 responsible for the lawful management of our National Forests, including
25 the Helena National Forest.
26
27

1 15. Defendant UNITED STATES FISH & WILDLIFE SERVICE (Wildlife
2 Service) is an administrative agency within the Department of Interior, and
3 is responsible for the lawful management of wildlife species listed under the
4 ESA.
5

6 **V. PROCEDURAL BACKGROUND**

7

8 16. The Project was originally authorized under a categorical exclusion to
9 NEPA analysis with a Decision Memo on September 14, 2005.
10

11 17. The initial Project decision was remanded back to the Forest Service
12 because it did not follow notice, comment, and administrative appeal
13 procedures for the Project.
14

15 18. A second Decision Memo was signed for the Project on March 6, 2006 after
16 allowing public notice and comment. The decision was administratively
17 appealed and remanded back to the Forest Service.
18

19 19. A third Decision Memo was signed for the Project on March 30, 2007.
20

21 20. Plaintiffs filed a lawsuit challenging the legality of the third Decision
22 Memo. *Alliance for the Wild Rockies v. Harp*, CV-07-51-H-DWM (D.
23 Mont. Aug. 21, 2007).
24

25 21. In response to the litigation, the Forest Service withdrew the third Decision
26 Memo approving the Project on Nov. 14, 2007 and the lawsuit was
27

1 dismissed.

2
3 22. On August 28, 2008, the Wildlife Service concurred in the Forest Service's
4 finding that the Project would not likely adversely affect the grizzly bear.

5 23. On Nov. 28, 2009, the Forest Service signed a Decision Notice/Finding of
6 No Significant Impact re-authorizing implementation of the Project. The
7 Project allows hundreds of acres of commercial logging, and the
8 construction of 0.5 miles of new temporary road.

9
10
11 24. On January 5, 2010, Plaintiffs filed a notice of intent to file suit over the
12 Project for violation of the Endangered Species Act with the U.S.
13 Department of Agriculture and U.S. Department of Interior.

14
15 25. On February 19, 2010, Defendant Weldon's office dismissed the
16 administrative appeals filed by Plaintiffs, constituting the final action of the
17 U.S. Department of Agriculture.
18

19 **VI. FACTUAL ALLEGATIONS**

20
21 **Winter Range**

22 26. The Forest Service admits that the winter range issue has "proven
23 controversial."

24
25 27. The Helena Forest Plan defines "winter range" as "[a] range, usually at
26 lower elevation, used by migratory deer and elk during the winter months,
27

1 usually better defined and smaller than summer ranges.”

2
3 28. The Forest Plan defines the winter range use period as December 1 through
4 May 15.

5 29. The Forest Service admits that the Helena Forest Plan “does not include a
6 seasonal range map.”
7

8 30. In the initial wildlife report for the Project in 2005, the Forest Service stated
9 that “[t]he project is entirely on winter range.” .
10

11 31. In that report, the Forest Service further stated that “[t]he Elliston project
12 area serves primarily as winter range for elk, mule deer, whitetailed deer,
13 and moose.”
14

15 32. In that 2005 report, the Forest Service further stated:

16 HNF field surveys (April-May, 2005) indicate that *in a relatively*
17 *mild, low-snow winter such as 2004-2005, elk and deer are broadly*
18 *distributed throughout project area forests.* The closed canopy
19 prevents Montana Fish, Wildlife and Parks (MFWP) biologists from
20 sighting elk in these forests during winter/spring aerial surveys, but
21 based on numbers seen in nearby parkland, they estimate up to 100
22 animals (R. Vinkey, personal communication, May 2005). . . . It is
23 likely that in mild winters elk are feeding in the open parks at night
24 and early in the day and then bedding in the timber for the rest of the
25 day (Beall 1974, p. 98).

24
25 (emphasis added).

26 33. In that 2005 report, the Forest Service further stated that “[e]lk and deer are
27

1 expected to continue using the project area in winter.”

2
3 34. In that 2005 report, the Forest Service further stated:

4 In the benign *winter* of 2004-2005 *elk* and deer *spent a great deal of*
5 *time in dense project area forests*, even though forage was limited
6 (wildlife field notes, April-May 2005). They may feel more secure in
7 the forest environment (R. Vinkey, personal communication, May
8 2005) or they may have been selecting for the timbered north slope
9 during a mild winter (Beall 1974, p. 99).

10 (emphasis added).

11 35. In that 2005 report, the Forest Service further stated that “[a]n estimated 30-
12 40 elk winter in the project area annually”

13 36. In that 2005 report, the Forest Service further stated that “[t]he project will
14 decrease hiding cover and ultimately increase forage for elk, moose, and
15 deer *on winter range*. Commonly hunted species will continue to avoid this
16 area during the hunting season and to *use it heavily in winter* and spring.”

17 (emphasis added).

18 37. In the 2005 report, the Forest Service stated that the Project would not affect
19 hiding cover on summer range, “because it will affect only winter range.”

20 38. In the 2005 report, the Forest Service concluded:

21 The Elliston Project Area and adjacent winter range areas are out of
22 compliance with the Forest Plan standard restricting vehicle use on
23 winter range (HFP, II-18). *The project* is a vegetation management
24 proposal and it will neither increase nor decrease motorized travel
25
26
27

1 routes. This issue will be dealt with in a separate analysis (Divide
2 Travel Plan) in the near future.

3
4 39. In March 2007, the Forest Service issue a new wildlife report. The 2007
5 report stated that the Project area is used by elk in “late winter” and “early
6 winter.”

7
8 40. The 2007 report noted that the Rocky Mountain Elk Foundation and the
9 Montana Department of Fish, Wildlife, and Parks (MFWP) distinguish
10 between “crucial winter range” and more general “winter range.”

11
12 41. The report noted that the Project area is entirely within “winter range”
13 mapped in 2004 by those organizations: “The RMEF/MFWP map for the
14 greater Little Blackfoot drainage (project file) shows an isolated block of
15 this winter range immediately south of Elliston. It encompasses about 4,150
16 acres, mostly on National Forest land, and includes the entire Elliston Fuels
17 project area.”

18
19 42. Although the 2007 report stated that the Project area was not mapped as
20 “crucial winter range” by the 2004 RMEF/MFWP maps, elk still use the
21 area in the early and late winter season during the harsher winters, and use
22 the area for the whole winter season during the more mild winters.
23
24
25

26 43. The 2007 report acknowledges that “[w]inter use will depend, as now, on
27

1 snow conditions.”

2
3 44. The 2007 report still conceded that “[t]he project will decrease hiding cover
4 and ultimately increase forage for elk, moose, and deer on *winter range*.”
5 (emphasis added).

6
7 45. Despite the admission of use by elk in at least part of the winter season, in
8 direct contrast to the 2005 report, the 2007 report states for the first time
9 that “[t]he project area is entirely on HFP summer range.”

10
11 46. In direct contrast to the 2005 report, the 2007 report states:

12 While elk do spend time in parts of the project area at the beginning
13 and, sometimes, at the end of mild/normal winter seasons, the area is
14 not classified as winter range for purposes of meeting HFP standards
15 and guidelines. Rather, it is classified as summer range, and HFP
16 travel restrictions for winter range do not apply.

17 47. Thus, the 2007 report essentially renamed the area from winter range to
18 summer range – despite undisputed winter use by elk during early and late
19 winter – ostensibly based upon (1) winter range designations from a 30 year
20 old map produced by the Forest Service in 1980 that was not incorporated
21 into the 1986 Forest Plan, and (2) the fact that the area is general MFWP
22 winter range instead of MFWP “crucial winter range.”

23
24
25 48. The 2007 report opined that “[s]ince these areas have not been delineated as
26
27

1 winter range, the motorized routes passing through them are in compliance
2 with [Forest Plan] standard [4c]. Likewise, any winter logging or hauling
3 operations in the eastern end of the project area will be in compliance.”

4
5 49. Plaintiffs filed a lawsuit in 2007, in part challenging the renaming of the
6 area as summer range as arbitrary and not based upon the best available
7 science. Plaintiffs also argued that if the Forest Service intends to apply the
8 winter range protections only to MFWP “crucial winter range” areas,
9 instead of to all MFWP “winter range” areas, the Forest Service must
10 complete a Forest Plan amendment redefining winter range from its current
11 definition, which includes all range used by elk in winter months.

12
13
14
15 50. In response to the litigation, the Forest Service withdrew the 2007 Decision
16 Memo for Project.

17
18 51. After the filing of the initial lawsuit, email correspondence between the
19 Forest Service and MFWP indicates that the Forest Service requested that
20 MFWP call the Elliston Face winter range something other than winter
21 range. One email informed MFWP that elk range was the “major issue that
22 is hanging our lawyers up” Another email told the MFWP that the
23 Forest Service “needs to set up a meeting w/ FWP to clarify the winter range
24 issue before we proceed w/ Elliston fuels proj. again.”
25
26
27

1 52. The notes from the eventual meeting on Sept. 17, 2007 state that the Forest
2 Service views compliance with the elk winter range standard as the “Forest
3 Plan problem.”

5 53. The Forest Service’s meeting notes state that the MFWP biologist’s
6 “conclusion is that the parks and adjacent forest cover in the project area
7 cannot be ruled out entirely as winter range.”

9 54. The Forest Service’s meeting notes state that MFWP biologist agreed to
10 “put[] together a carefully worded letter, which he will screen through the
11 powers-that-be in Region 2 (mainly Mack Long). . . .”

13 55. The Forest Service’s meeting notes stated that MFWP “do[es]n’t want to
14 retract a winter range delineation for the benefit of the Forest Service”
15 and the future map changes would not likely occur “in time to help the
16 Elliston project in this litigation.”

18 56. In a follow-up email on Sept. 21, 2007, the Forest Service biologist stated:
19
20 The Planners and other powers-that-be here are on me already about
21 getting some sort of communication from FWP about the winter range
22 stuff we talked about last week They also want some sort of
23 affirmation from FWP that the seasonal range map is designed for
24 initial resource review & not individual project tactics. I don't
25 remember if we even talked about that. Anyway, if you can knock
26 something out in the next little bit & run it through channels it will
27 make my life easier over here. I'd say, word it carefully, but keep it
28 brief.

1
2 57. In another follow-up email on Nov. 5, 2007 from the MFWP biologist to the
3 Forest Service, the MFWP biologist stated “[a]s we discussed the area
4 should be classified as transitional winter range.”
5

6 58. A now-retired MFWP wildlife biologist, Gayle Joslin, who has been
7 involved in some of the planning for this Project, submitted a declaration to
8 the Forest Service that documented elk presence in the Project area during a
9 December 2009 site visit, and thus confirms that the area is currently being
10 used as elk winter range.
11
12

13 59. Reports from local residents also confirm elk presence in the winter.

14 60. In the EA and DN for the Project, the Forest Service misrepresented the
15 MFWP correspondence: instead of acknowledging that the area is
16 “transitional winter range” and acknowledging that MFWP’s “conclusion is
17 that the parks and adjacent forest cover in the project area cannot be ruled
18 out entirely as winter range,” the Forest Service claimed the area is simply
19 “transitional range.”
20
21
22

23 61. The Forest Service implied that the MFWP agreed that the area should no
24 longer be classified as winter range at all: “The project wildlife biologist has
25 consulted with the State of Montana Fish, Wildlife and Parks (MFWP)
26
27

1 District Biologist to determine if this area is winter range for elk It was
2 determined that the project area is not located in elk winter range.”
3

4 62. The Forest Service also asserted that “the Elliston Face area is not
5 considered winter range by the HNF or MFWP”
6

7 63. The Forest Service also asserted that “[t]he MFWP wildlife biologist for this
8 area has been contacted numerous times to ensure this issue is addressed
9 and that there is no disagreement that the area is not winter range relative to
10 elk use and management.”
11

12 64. The Forest Service implied that MFWP agreed the area should be classified
13 as summer range: “[b]ased on field observations and aerial flight data, the
14 area was not classified as winter range by the MFWP in their 2008 database
15 and that [sic] the continued classification of this area as summer range is
16 appropriate.”
17

18 65. Thus, the Forest Service stated that since the area was “transitional range”
19 and the Forest Plan did not address “transitional range,” it could reclassify
20 the area as “summer range” and did not have to comply with winter range
21 standards.
22

23 66. The Forest Service did not offer to promulgate a Forest Plan standard or
24 definition addressing “transitional range” or “transitional winter range.”
25
26
27

1 67. Additionally, during administrative appeal review, the Forest Service
2 disclosed to the Plaintiffs that it has redefined “winter” as December 21 to
3 March 20.
4

5 68. With this new definition of winter, the Forest Service discounted the
6 numerous and consistent elk sightings in the Project area in early and mid-
7 December, late March, April, and May as not winter sightings.
8

9 69. Previously, the Forest Service and MFWP called these early/mid-December,
10 late March, April, and May sightings “early winter” or “late winter.”
11

12 70. The classification of early/mid-December, late March, April, and May as
13 part of winter is consistent with the winter range use period defined by the
14 Forest Plan as December 1 to May 15.
15

16 71. The Forest Service did not amend the Forest Plan to reflect its new
17 definition of winter.
18

19 **Elk Hiding Cover**
20

21 72. The Forest Service states that “current forested hiding [] cover will be
22 mostly lost” as a result of Project implementation.
23

24 73. The Forest Service uses the MFWP definition of hiding cover, which is 40%
25 canopy closure, to calculate hiding cover estimates for timber sales.
26

27 *Wildlife Forest Plan Big Game Standards Consistency Approach, Helena*
28

1 *National Forest* (“The hiding cover/open road density standard will be
2 applied to the Elk Analysis Area....We will be utilizing the FWP definition
3 of hiding cover [] - a stand of coniferous trees havng a crown closure of
4 greater than 40 percent”); *see also Criteria for Wildlife Models Helena*
5
6 *National Forest Version 2009* (hiding cover includes stands of 40 acres or
7 more with any size of trees with canopy cover over 40%).
8

9
10 74. The Forest Service did not use the Forest Service definition of hiding cover,
11 which is a stand that conceals at least 90% of a standing elk at 200 feet, for
12 the Project analysis for compliance with Forest Plan standard #4a.
13

14 75. The amount of the affected Elk Herd Unit that can conceal at least 90% of a
15 standing elk at 200 feet is unknown and is not disclosed to the public in the
16 EA or DN for the Project.
17

18 76. Although the EA and DN state that the Forest Service definition of hiding
19 cover was used for the Project analysis, this representation is vague and
20 misleading. In actuality, the timber sale planners refer to use of an “FP”
21 definition solely for the Forest Plan requirement that stands of hiding cover
22 must be in stands of 40 acres or more, which is consistent with the guidance
23 documents cited above.
24
25

26 77. Thus, the Project analysis estimated hiding cover by including all stands of
27

1 40 acres or more that have canopy coverage of 40% or more.

2
3 78. The Forest Service did not include all open roads when determining the
4 open road density during hunting season for Forest Plan standard #4a.
5 Instead it included only 25% of local roads, and no primitive roads. *Wildlife*
6 *Forest Plan Big Game Standards Consistency Approach, Helena National*
7 *Forest .*
8

9
10 79. Thus, although there are actually at least 71.8 miles of open roads during
11 hunting season in the affected Elk Analysis Area, the Forest Service
12 discloses only a “weighted” road density of 0.77 mi/sq. mi. with a
13 numerator of only 46.3 miles of open roads during hunting season.
14

15 80. There are likely more than 71.8 miles of open roads in the affected Elk
16 Analysis Area because the number of miles of primitive roads is unknown
17 and/or undisclosed. For example, MFWP finds that “[n]umerous unmapped
18 and non-system ATV trails exist in this area and opening the stands would
19 be expected to exacerbate this problem.”
20
21

22 81. The actual open road density including all local and collector roads (but still
23 excluding primitive roads) during hunting season in the affected Elk
24 Analysis Area is 1.6 mi/sq. mi.
25

26 82. This actual road density in the Elk Analysis Area is not disclosed to the
27

1 public in the EA or DN.

2
3 83. With an open road density of 1.6 mi/sq. mi., the Forest Plan requires an
4 MFWP hiding cover percentage of at least 65%.

5
6 84. Even with an open road density of 0.77 mi/sq mi, the Forest Plan requires an
7 MFWP hiding cover percentage of at least 56.1%.

8
9 85. According to the MFWP definition of hiding cover, the hiding cover
10 percentage is currently 57.1% in the Elk Analysis Area and will be reduced
11 to 55.6% in the Elk Analysis Area by the Project.

12
13 86. The Forest Service states that the weighted open road density in the Elk
14 Herd Unit is 0.78 mi/sq mi.

15
16 87. With an open road density of 0.78 mi/sq. mi., the Forest Plan requires an
17 MFWP hiding cover percentage of at least 56.2%.

18
19 88. According to the MFWP definition of hiding cover, the hiding cover
20 percentage in the entire Elk Herd Unit is currently 41.0% and will be
21 reduced to 40.1% by the Project.

22 **Five Year Review**

23
24 89. The Helena National Forest Plan draft Five Year Review raised concerns
25 about the way the Forest Service is managing the Forest.

26
27 90. The report identified ten amendments that "really needed to be incorporated

1 into the Forest Plan" prior to the official revision of the Forest Plan.

2
3 91. The report also listed 39 other findings which were not as "immediate" as
4 the first ten proposed amendments, but required action before or during the
5 official Forest Plan revision.

6
7 92. One of the ten immediate and necessary amendments proposed by the
8 interdisciplinary team was Amendment 3, which stated "the wildlife
9 monitoring elements all need revising. The Forest Plan will be amended to
10 reflect new information ... on sensitive species, indicator species, and old
11 growth."
12

13
14 93. Further expounding on this area of concern, the report states:

15 The Forest does not know: 1) if the wildlife monitoring elements are
16 effective or not effective; 2) if the selected MIS species are true
17 indicators of the effects of management; 3) if past activities have
18 affected the indicator species; or 4) if the management indicator
19 species concept is the best way to measure effects of management
20 practices on certain habitats with the objective of ensuring biodiversity
21 and viability of existing species.

22 94. Regarding monitoring requirements and viability insurance, the report
23 further states:

24 Most of the wildlife monitoring has not been completed from year to
25 year ... The NEPA process for projects reveals that we lack the
26 necessary baseline data to conduct effective monitoring ... Merely
27 gathering information on the presence and abundance of indicator
28 species does not, by itself, answer the question of local or regional

1 viability ... We constantly encounter difficulty in analyzing MIS in
2 NEPA documents because of the lack of baseline data.

3 The Forest Plan expected that the monitoring plan would be
4 implemented and that monitoring results would reveal any deficiencies
5 in carrying out Forest Plan decision. This has not been the case.

6 Monitoring elements were designed in such a way that if a change or
7 deviation from previous measurements occurred then action would
8 be initiated. No action has ever been initiated. Either we have met our
9 expectation, or we haven't the information to compare current
10 measurements with past measurements, or the monitoring process has
11 not worked.

12 95. The report also raised concerns about the validity of the Forest Plan old
13 growth standard:

14 The question exist as to whether maintaining 5% old growth is enough
15 to maintain viable populations ... In nearly all the site specific
16 analysis done on the forest for the last 5 years ... we have run into the
17 problem of being able to meet the old growth requirements (standards)
18 in the Forest Plan ... It appears that we do not have a very accurate
19 inventory of the old growth on the forest ... The objective was to
20 measure 20% of the forested land each year to determine how much
21 old growth was present. In addition monitoring of the presence or
22 absence of old growth indicator species was to take place to
23 determine if habitat was occupied. Much of the monitoring did not
24 happen due to lack of funds.

25 96. Another concern raised by the report was the problem with protecting the
26 sensitive species. Specifically the report stated that "the determination of
27 population viability is near impossible because the necessary inventory
28 defining the extent of populations is lacking."

1 **Old Growth Habitat & Species Viability**

2
3 97. The analysis for the Project illustrates the Forest Plan implementation flaws
4 disclosed in the draft Five Year Report.

5 98. The Forest Service is not meeting its Forest Plan old growth habitat
6 requirement for the Project area: the Forest Plan requires 5% old growth in
7 each third order drainage, but the Project area only has 159 acres of actual
8 existing old growth in third order drainage 1109, which is only 4.2% old
9 growth.
10
11

12 99. The Forest Service never disclosed this fact to the public in the EA or DN,
13 and instead represented that “Elliston Creek qualifies as a third-order
14 drainage and is being managed to retain more than 5% old-growth.”
15

16 100. In the Project EA, the Forest Service did not address the question identified
17 by its own scientists in the draft Five Year Report “as to whether maintaining
18 5% old growth is enough to maintain viable populations.”
19

20 101. In the Project EA, the Forest Service did not address the issue identified by
21 its own scientists in the draft Five Year Report that it does “not have a very
22 accurate inventory of the old growth on the [Helena National] forest.”
23

24 102. In the Project EA, the Forest Service did not address the issue identified by
25 its own scientists in the draft Five Year Report that "the determination of
26
27

1 population viability is near impossible because the necessary inventory
2 defining the extent of populations is lacking" and that the Forest Service
3 "lack[s] the necessary baseline data to conduct effective monitoring ...
4 Merely gathering information on the presence and abundance of indicator
5 species does not, by itself, answer the question of local or regional viability.”

6
7
8 103. In the Project EA, the Forest Service did not address the issue identified by
9 its own scientists in the draft Five Year Report that the Forest Service does
10 not know “if past activities have affected the indicator species”

11
12 104. The Forest Service concedes that the Project “will alter habitat conditions for
13 old-growth indicator species.”

14
15 105. The northern goshawk is an old growth management indicator species for the
16 forest and is known to have nested in the Project area in the past.

17
18 106. The Forest Service admits that the Project will “reduce suitability of local
19 habitat” for the goshawk, so that after logging “ [g]oshawks would no longer
20 find nesting habitat in the project area.”

21
22 107. More specifically, the Project will eliminate 425 acres of goshawk nesting
23 habitat in the Project area.

24
25 108. The Forest Service concedes that goshawk habitat “is in decline.”

26 109. The State of Montana has recently upgraded the goshawk to an S3 species,
27

1 which is identified as a species "potentially at risk because of limited and/or
2 declining numbers, range, and/or habitat."
3

4 110. The Forest Service did not provide a population estimate for goshawks on
5 the Forest, nor a population trend that would indicate the impact of logging
6 projects over time on this indicator species.
7

8 111. The Forest Service did not explain how it can make conclusions about
9 goshawk viability on the Forest without knowledge of the goshawk
10 population trend in the area.
11

12 **Grizzly Bear**

13
14 112. Before European settlement of the American West, grizzly bears (*Ursus*
15 *arctos horribilis*) roamed west from the Great Plains to the California coast,
16 and south to Texas and Mexico.
17

18 113. With westward expansion, grizzlies were "shot, poisoned, and trapped
19 wherever they were found."
20

21 114. Once over 50,000 strong in the lower 48 states, grizzlies were reduced to less
22 than 1,000 bears.
23

24 115. Thus, from the 1800s to the early 1900s, humans reduced the range of the
25 grizzly bear to less than 2% of its former range south of Canada, limiting the
26 bear to a few isolated populations in mountainous regions, wilderness areas,
27

1 and National Parks in Montana, Idaho, Wyoming, and Washington.

2
3 116. In 1975, the Wildlife Service listed grizzly bears in the lower 48 states as a
4 "threatened" species under the Endangered Species Act (ESA).

5
6 117. The Wildlife Service approved a Grizzly Bear Recovery Plan in 1982 and
7 revised the Plan in 1993.

8
9 118. The 1993 Recovery Plan established "Recovery Zones" for the four
10 ecosystems known to be inhabited by grizzly bears at that time, including the
11 Northern Continental Divide Ecosystem (NCDE) of Montana.

12
13 119. In 2002, the Wildlife Service identified federal lands outside the NCDE
14 Recovery Zone where grizzly bears were then expected to be found in most
15 years.

16
17 120. As of 2002, the map for this NCDE "Distribution Zone" shows grizzly bear
18 habitat use extending southward across the Blackfoot and Continental Divide
19 landscape areas down to Mullan Pass on the Helena Ranger District.

20
21 121. In light of the expanding range of the NCDE grizzly bear population, the
22 Forest Service completed a Biological Assessment in 2005 to determine the
23 impact of current Helena Forest Plan implementation on the grizzly bear.

24
25 122. The Biological Assessment found that in 2005 there were 12 different
26 Helena Forest Plan "Management Areas" within the NCDE Distribution
27

1 Zone. None of those Management Areas has a specific road density
2 standard, and 52% of the affected area is classified as either moderate or
3 high road density.
4

5 123. For example, in the part of the Helena Ranger District within the NCDE
6 Distribution Zone, the Management Area T1 has a total road density of 2.8
7 miles/square mile and an open road density of 1.7 miles/square mile. This
8 estimate of road density includes only Forest Service roads, thus the actual
9 road density is likely higher.
10
11

12 124. To put these numbers in perspective, the Forest Plan prohibits road density
13 over 0.55 miles/square mile in occupied grizzly habitat.
14

15 125. The Forest Service concluded in 2005 that “implementation of the Forest
16 Plan ‘may affect and is likely to adversely affect grizzly bears’ in the Grizzly
17 Bear Distribution Zone.”
18

19 126. In its June 2006 Biological Opinion, the Wildlife Service concluded that
20 “grizzly bears living outside the recovery zone experience higher levels, in
21 some areas considerably higher levels, of adverse affects from
22 implementation of actions under the Forest Plan than those bears living
23 inside the recovery zone.”
24
25

26 127. The Wildlife Service found that these adverse effects rose to the level of
27

1 incidental take of the grizzly bears outside of the Recovery Zone.

2
3 128. In particular, the Wildlife Service noted that temporary road construction and
4 temporary road use for logging activities are causing incidental take of
5 grizzly bears:

6
7 Under the Forest Plan, temporary roads built for resource
8 extraction such as timber harvest or mining may remain on the
9 landscape for several years and receive a substantive amount of
10 use. Such roads may also impair grizzly bears through
11 displacement from key habitats. The Service expects that
12 temporary roading will occur on lands within the distribution of
13 grizzly bears on the Forest, outside the recovery zone. The
14 Service also anticipates some level of impairment to grizzly
15 bears with home ranges impacted by these temporary roads.

16
17 129. The Elliston project area lies in the Helena Ranger District in Management
18 Area T1, about 6 miles south of the NCDE Distribution Zone as it was
19 mapped 8 years ago.

20
21 130. Since that time, the agencies have documented grizzly bears traveling further
22 south, including at least one verified sighting within only 2 miles of the
23 Project area.

24
25 131. The Forest Service concedes that “the proximity of the occupied zone and
26 the continued southward movement of grizzlies through the Divide
27 landscape are indicative of the potential for bears to approach or move
28 through the project area.”

1 132. Despite the fact that Management Area T1 on the Helena Ranger District
2 already has a road density that led to a “likely to adversely affect conclusion”
3 for implementation of the Helena Forest Plan, and in fact results in incidental
4 take of grizzly bears, the agencies concurred that new temporary road
5 construction and increased road use in the Project area would not adversely
6 affect the grizzly bear.
7

8
9 133. The agencies did not address the implications of the fact that the Project area
10 is likely occupied grizzly habitat with an open road density of 1.6 mi/sq mi.,
11 which is far in excess of the Forest Plan threshold of 0.55 mi/sq mi.
12

13
14 **Canada lynx**

15 134. The Forest Service concedes that the “project area lies within what has been
16 characterized as the Continental Divide linkage zone.”
17

18 135. The Forest Service concedes that this linkage zone “is a region of suitable
19 habitat in which dispersing animals ([including] lynx . . .) can live as they
20 slowly make their way between larger blocks of more suitable habitat.”
21

22 136. The Forest Service concedes that the Project area currently has at least
23 “moderate value” as a corridor environment for wildlife due to the existing
24 forest cover.
25

26 137. The Project area is also within Lynx Analysis Unit DI-03.
27

1 138. The Forest Service admits that the presence of lynx has been verified within
2 several miles of the Project area.
3

4 139. The Wildlife Service states that “it is possible that lynx range through the
5 project area”
6

7 140. The Forest Service concedes that the Project area encompasses potential lynx
8 habitat, which it refers to as “travel habitat.”
9

10 141. The Forest Service concedes that implementation of the Project “ would
11 make the area less suitable” as “forest travel habitat.”
12

13 142. The Forest Service concedes that the logging from the Project will eliminate
14 the capacity of the Project area to provide sufficient cover for lynx to use the
15 area as a linkage area, stating that after the Project “lynx [] are likely to
16 choose alternate routes through denser forest” and “lynx [] will find the
17 change unfavorable.”
18

19 143. The Forest Service did not disclose (to the public in the EA/DN), or explain
20 how the Project complies with, the Forest Plan requirement to maintain
21 habitat connectivity in lynx linkage zones and LAUs.
22
23
24
25
26
27

1 **VII. CLAIMS FOR RELIEF**

2 **FIRST CLAIM FOR RELIEF**

3
4 The Forest Service is violating NFMA by failing
5 to comply with the Helena Forest Plan elk winter range standard #4c.

6 144. All previous paragraphs are incorporated by reference.

7 145. The Forest Plan prohibits motorized vehicle use on elk winter range.

8
9 146. The Forest Plan defines this winter use time period as extending from
10 December 1 through May 15.

11 147. The Forest Plan defines “winter range” as “[a] range, usually at lower
12 elevation, used by migratory deer and elk during the winter months, usually
13 better defined and smaller than summer ranges.”

14
15 148. The original Forest Service wildlife report documented that the Project “is
16 entirely on winter range.”

17
18 149. After several administrative remands, one round of litigation, and continued
19 involvement by Forest Service attorneys, the Forest Service now argues that
20 “[i]t is clear the project area does not fall within winter range.”

21
22 150. The Forest Service’s newly crafted position is contradicted by the record,
23 which shows consistent elk use in the area in the early and late winter
24 months, as well as in mid-winter in milder winters.
25
26

1 151. The approval of the Project violates NFMA because it violates the Forest
2 Plan prohibition against motorized vehicle use on winter range.
3

4 SECOND CLAIM FOR RELIEF

5 The Forest Service is violating NEPA by failing
6 to fully inform the public regarding the elk winter range issue.

7 152. All previous paragraphs are incorporated by reference.
8

9 153. NEPA requires that agencies act with "scientific integrity" in environmental
10 analyses, take a hard look at the effects of a project, fully inform the public
11 of those effects, and disclose controversies and uncertainties regarding those
12 effects.
13

14 154. The Project record contains a series of emails between the Forest Service and
15 the MFWP wherein the Forest Service coaxes MFWP to change its decision
16 to designate the Project area as winter range. Forest Service emails tell the
17 MFWP that Forest Service lawyers find the winter range issue problematic
18 and tell the MFWP to word its new designation carefully. The emails make it
19 clear that attorneys and managers for the Forest Service collaborated to
20 decide to redesignate the Project area as something other than winter range
21 so that the Forest Service would not have to comply with the legally binding
22 Forest Plan requirements for winter range.
23
24
25
26
27

1 155. However, despite the Forest Service's best efforts, the MFWP biologist did
2 not completely undesignate this area as winter range. Instead the MFWP
3 biologist now calls the area "transitional winter range" as opposed to "winter
4 range," "core winter range," or "crucial winter range."

5
6
7 156. The MFWP could not completely undesignate this area as winter range
8 because the Project file is replete with decades of survey information that
9 consistently find that elk use this area in early and late winter, and even in
10 mid-winter during mild winters.

11
12 157. Despite the fact that "transitional range" actually refers to "transitional
13 winter range" according to the MFWP, the Forest Service represented to the
14 public in the EA and DN that there is consensus between the Forest Service
15 and MFWP that the area encompasses no winter range, that such
16 designations in the past were "in error," and that MFWP believes the area
17 should be classified as summer range.

18
19
20
21 158. The Forest Service's concerted effort to eliminate the winter range
22 classification for this Project area and its misrepresentations to the public
23 regarding the actual determinations of MFWP violate NEPA's requirements
24 to take a hard look at the effects of a project, fully inform the public of those
25 effects, disclose controversies and uncertainties, and act with scientific
26

1 integrity.

2
3 THIRD CLAIM FOR RELIEF

4 The Forest Service is violating NFMA because its old growth standard is invalid
5 and/or unmet, and it is not monitoring population trends of old growth management
6 indicator species on the Helena National Forest.

7 159. All previous paragraphs are incorporated by reference.

8 160. Under NFMA, the Forest Service must ensure that an old growth habitat
9 standard in a Forest Plan is both valid and being met on the Forest.

10 161. The Helena Forest Plan requires 5% old growth in each third order drainage.

11 162. The Helena Forest Plan mandates that the Forest Service monitor population
12 trends of management indicator species.
13

14 163. The draft Five Year Report found that the Forest's old growth inventory was
15 inaccurate, that the Forest Service lacked sufficient monitoring data to make
16 determinations of indicator species populations and effects, and that that the
17 5% old growth requirement has never been validated as to its ability to
18 maintain old growth species viability.
19
20
21

22 164. The Project area only has 4.2% old growth in the affected third order
23 drainage.
24

25 165. The goshawk is an old growth indicator species for the Forest. Goshawk
26 habitat is declining and the Project will remove all goshawk nesting habitat
27

1 from the Project area.

2 166. The Forest Service has never determined population trends for the goshawk.

3
4 167. The Forest Service is violating NFMA because it has failed to monitor
5 population trends of old growth indicator species and its habitat proxy
6 methodology is either invalid and/or not being met.
7

8 FOURTH CLAIM FOR RELIEF

9
10 The Forest Service is violating NEPA by failing to disclose significant findings
11 from the Helena National Forest Five Year Review to the public in the Project EA.

12 168. All previous paragraphs are incorporated by reference.

13 169. The draft Five Year Report on implementation of the Helena National Forest
14 Plan raised numerous significant issues related to failures and flaws of the
15 Forest Plan and its implementation.
16

17 170. For example, the report questioned the validity of the 5% threshold for
18 maintaining old growth species viability, stated that the Forest's inventory of
19 old growth habitat was inaccurate, and noted the chronic failure to
20 meaningfully monitor indicator species populations and determine species
21 viability.
22
23

24 171. Despite the fact that the Forest Service relies on this Forest Plan to
25 demonstrate compliance with NFMA, it did not acknowledge, much less
26

1 address, these flaws and failures of the Forest Plan in the EA for the Project.

2
3 172. The Forest Service’s failure to disclose the significant forest management
4 concerns raised in the draft Five Year Report to the public in the EA violates
5 NEPA.

6
7 FIFTH CLAIM FOR RELIEF

8 The Project violates NFMA and the ESA because it increases road density in the
9 Project area, and the agencies’ conclusion that it is “not likely to adversely affect”
10 the grizzly bear is not based upon the best available science and is arbitrary.

11
12 173. All previous paragraphs are incorporated by reference.

13 174. The Project area is within the Continental Divide linkage zone.

14
15 175. The Forest Service concedes that there is potential for grizzly bears
16 dispersing south from the Northern Continental Divide Ecosystem to pass
17 through the Project area.

18
19 176. Indeed, grizzly bear presence has already been confirmed within several
20 miles of the Project area.

21
22 177. The Forest Service concedes that the implementation of the current Helena
23 National Forest Plan may adversely affect grizzly bears.

24
25 178. The Project will increase road density above the threshold road density level
26 of 0.55 set for occupied grizzly bear habitat on the Forest.

1 179. In light of the likely presence of grizzly bears, the adverse effect
2 determination for the Helena Forest Plan, and the increase in road density
3 above the threshold set by the Forest Plan, the “not likely to adversely affect”
4 determination for the Project is arbitrary and not based upon the best
5 available science.
6

7
8 180. The increase in road density above 0.55 mi/sq mi. also violates NFMA by
9 violation of the Forest Plan.
10

11 SIXTH CLAIM FOR RELIEF

12 The Forest Service is violating NFMA and the ESA
13 because the Project does not comply with the Forest Plan prohibition
14 against degradation of lynx linkage habitat.
15

16 181. All previous paragraphs are incorporated by reference.

17 182. The Helena Forest Plan, as amended in 2007 with the Northern Rockies
18 Lynx Management Direction, requires that “vegetation management projects
19 must maintain habitat connectivity in an LAU [lynx analysis unit] and/or
20 linkage area.”
21

22
23 183. The Project area is within the Continental Divide linkage zone and within
24 Lynx Analysis Unit DI-03.

25 184. The Forest Service concedes that implementation of the Project “would
26

1 make the area less suitable” as “forest travel habitat” for lynx.

2
3 185. The Forest Service also concedes that after Project implementation “lynx []
4 will find the change unfavorable” and that “lynx [] are likely to choose
5 alternate routes through denser forest” after Project implementation.

6
7 186. The Forest Service’s complete failure to even acknowledge the Forest Plan
8 connectivity standard at all in the EA, much less provide an explanation as to
9 how the Project complies with the standard in light of the fact that it will
10 make lynx habitat in a LAU unsuitable as linkage habitat, is arbitrary and
11 violates NFMA.

12
13
14 187. Likewise, the agencies’ complete failure to address this standard, and the
15 impact of a violation of this standard, renders their “not likely to adversely
16 affect” conclusion arbitrary and in violation of the ESA for failure to
17 consider an important factor.

18
19 SEVENTH CLAIM FOR RELIEF

20
21 The Forest Service is violating NFMA because the Project does not comply
22 with the Forest Plan elk hiding cover/open road density standard #4a.

23 188. All previous paragraphs are incorporated by reference.

24 189. The Forest Service assessed compliance with Forest Plan standard #4a by
25 using the MFWP definition of hiding cover of a stand with over 40% canopy
26

1 closure.

2
3 190. Under the MFWP definition, the Forest Plan requires hiding cover to be at
4 least 56.1% in this “elk analysis area,” but likely even more than 65%.

5 191. The Project will violate this requirement by reducing hiding cover in the elk
6 analysis area from 57.1% to 55.6%.

7
8 192. The violation of this Forest Plan requirement is a violation of NFMA.

9
10 EIGHTH CLAIM FOR RELIEF

11 The Forest Service is violating NEPA by failing to meaningfully address the
12 cumulative effects of the Elliston Face and Telegraph Projects in the Project EA.

13 193. All previous paragraphs are incorporated by reference.

14 194. The Forest Service stated that the cumulative effects area for the Project is
15 the Upper Little Blackfoot drainage.

16
17 195. In November 2009, the Forest Service released a proposal for a large timber
18 sale within the Upper Little Blackfoot drainage called the Telegraph
19 Vegetation Project. The proposal included details such as a map of the
20 Project area, the number of acres that will be affected by treatments, the
21 types of treatments planned with prescriptions listed for individual units, and
22 the miles of new roads necessary for Project implementation.

23
24
25 196. The Telegraph Vegetation Project area is about 23,577 acres with
26

1 approximately 6,335 acres are proposed for treatment. These treatments
2 include almost 4,000 acres of clearcuts and up to 7 new miles of road
3 construction.
4

5 197. The Forest Service acknowledges that the Telegraph Project is a foreseeable
6 federal activity within the cumulative effects area for the challenged Project.
7

8 198. The full extent of the discussion of the cumulative effects of the Telegraph
9 Project are several conclusory statements in the November 2009 EA that it
10 will not have a cumulative effect and a few vague paragraphs that provide no
11 details about the Project.
12

13 199. The November 2009 DN does not acknowledge the Telegraph Project at all.
14

15 200. The Forest Service completely failed to address the cumulative effect of the
16 Elliston Face and Telegraph Projects with any meaningful detail.
17

18 201. The Forest Service's failure to meaningfully discuss the cumulative effects
19 of these Projects violates NEPA.
20

21 NINTH CLAIM FOR RELIEF

22 The Forest Service is violating NFMA because the Project
23 violates Forest Plan calving ground standard #4b.

24 202. All previous paragraphs are incorporated by reference.

25 203. The Forest Plan prohibits motorized vehicle use in elk calving grounds from
26

1 late May through mid-June.

2
3 204. The Forest Service concedes that the Project area provides elk calving
4 grounds.

5
6 205. The Project allows the use of motorized vehicles in the Project area to
7 harvest and haul logs.

8
9 206. The use of motorized vehicles in the Project area in late May through mid-
10 June violates the Forest Plan, and thus violates NFMA.

11 TENTH CLAIM FOR RELIEF

12 The Forest Service is violating NEPA because
13 it did not complete a full EIS for this Project.

14 207. All previous paragraphs are incorporated by reference.

15
16 208. NEPA requires an agency to complete a full EIS for a project if it may cause
17 significant impacts.

18
19 209. Impacts are significant if any of the following are applicable: individually
20 significant impacts; cumulatively significant impacts; presence of
21 endangered or threatened species; scientific controversy and/or uncertainty;
22 and violation of federal environmental laws.

23
24 210. The Project will have a cumulatively significant effect with the proposed
25 Telegraph Project.
26

- 1 211. The Project's impact will be significant because it impacts ESA-listed
2 threatened wildlife species, including the threatened Canada lynx and the
3 threatened grizzly bear.
4
- 5 212. The Project's impact will be significant because there is a controversy and/or
6 uncertainty regarding elk winter range in the Project area.
7
- 8 213. The Project's impact will be cumulatively significant because it implements
9 a Forest Plan that is adversely affecting threatened grizzly bears and failing
10 to maintain viability of old growth dependent species.
11
- 12 214. The Project's impact will be significant because its implementation will
13 violate the ESA, NFMA, NEPA, and the APA.
14
- 15 215. The Forest Service's failure to complete a full EIS for the Project in light of
16 all of these individually and cumulatively significant impacts violates NEPA.
17

18 **VIII. RELIEF REQUESTED**

19 For all of the above stated reasons, Plaintiffs request that this Court award the
20 following relief:
21

- 22 A. Declare that the Forest Service is violating NFMA and NEPA because the
23 Project violates Forest Plan requirements regarding elk winter range, elk
24 calving areas, elk hiding cover and open road density, lynx habitat
25 connectivity, grizzly bear habitat, and monitoring of population trends of
26

1 management indicator species.

2
3 B. Declare that the Forest Service is violating NEPA because the Project EA
4 fails to adequately disclose the controversy over elk winter range, fails to
5 adequately disclose the concerns raised in the Forest Plan Five Year Review,
6 and fails to adequately assess the cumulative impacts of the Telegraph
7 Vegetation Project and this Project;

8
9 C. Declare that the agencies are violating the ESA because their conclusions
10 that the Project will not adversely affect the grizzly bear and lynx are
11 arbitrary and not based upon the best available science;

12
13 D. Declare that the Forest Service must withdraw the Project, or alternatively
14 complete a full environmental impact statement for the Project;

15
16 E. Enjoin implementation of the Project, including the sale of the Project timber
17 sale(s);

18
19 F. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable
20 attorney fees under EAJA and the ESA fee provision; and

21
22 G. Grant Plaintiffs such further relief as may be just, proper, and equitable.
23
24
25
26

1 Respectfully submitted this 3rd Day of May, 2010.

2
3 /s/ Rebecca K. Smith

4 Rebecca K. Smith

5 PUBLIC INTEREST DEFENSE CENTER, PC

6 Timothy M. Bechtold

7 BECHTOLD LAW FIRM, PLLC

8 Attorneys for Plaintiffs