

K. E. Purcie Bennett
COTTONWOOD ENVIRONMENTAL LAW CENTER
24 S. Wilson Avenue, Suite 6-7
Bozeman, MT 59715
Ph: (406) 587-5800
Purcie@cottonwoodlaw.org

John Meyer
COTTONWOOD ENVIRONMENTAL LAW CENTER
24 S. Wilson Avenue, Suite 6-7
Bozeman, MT 59715
Ph: (406) 587-5800
John@cottonwoodlaw.org

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

)	
Native Ecosystems Council, and)	
Alliance for the Wild Rockies,)	Cause No. CV-10-57-M-DWM
Plaintiffs,)	
vs.)	
)	COMPLAINT FOR
LESLIE WELDON, in her official)	DECLARATORY AND
capacity as Regional Forester of Region)	INJUNCTIVE RELIEF
One of the U.S. Forest Service; and)	
UNITED STATES FOREST)	
SERVICE, an agency of the U.S.)	
Department of Agriculture,)	
Defendants.)	
)	
)	
)	

I. INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, of the United States Forest Service's Decision Notice and Finding of No Significant Impact (DN) authorizing implementation of the Ettien Ridge Fuels Reduction Project (Project).

2. Plaintiffs Native Ecosystems Council and Alliance for the Wild Rockies allege this decision is arbitrary and capricious, an abuse of discretion, and/or otherwise not in compliance with the law.

3. Defendant's approval of the Project as written is a violation of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.*, the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*

4. Plaintiffs request that the Court set aside the decision approving the Project, pursuant to 5 U.S.C. § 706(2)(A), and that the Court enjoin the U.S. Forest Service from implementing the Project.

5. Plaintiffs seek declaratory and injunctive relief to mitigate, redress, or avoid irreparable injury to the environment and its interests under the law, and such other relief as this Court deems just and proper.

6. If Plaintiffs prevail, Plaintiffs will seek an award of costs of suit, including attorney and expert witness fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

II. JURISDICTION

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

8. An actual, justiciable controversy exists between Plaintiffs and Defendants. Plaintiffs' members use and enjoy the Lewis and Clark National Forest for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiffs' members intend to continue to use and enjoy the affected area frequently and on an ongoing basis in the future.

9. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs' members have been and will be adversely affected and irreparably injured if defendants are allowed to continue implementing the Project as approved. These are actual, concrete injuries caused by defendants' failure to comply with mandatory duties under NFMA, NEPA, and the APA. The requested relief would redress these injuries and this

Court has the authority to grant Plaintiffs' requested relief under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 and 706.

10. Plaintiffs and their members submitted extensive, written comments concerning the Project and fully participated in the available administrative review and appeal processes, thus they have exhausted administrative remedies. Defendants' denial of Plaintiff's administrative appeals were the final administrative actions of the U.S. Department of Agriculture Forest Service. Thus, the challenged decision is final and subject to this Court's review under the APA, 5 U.S.C. §§ 702, 704, and 706.

III. VENUE

11. Venue is proper in this case under 28 U.S.C. § 1391 (e) and LR 3.3(a)(1). Defendant LESLIE WELDON, the primary representative of Defendant U.S. Forest Service in the District of Montana, resides within the Missoula Division of the United States District Court for the District of Montana.

IV. PARTIES

12. Plaintiff NATIVE ECOSYSTEMS COUNCIL is a non-profit Montana corporation with its principal place of business in Three Forks, Montana. Native Ecosystems Council is dedicated to the conservation of natural resources on public lands in the Northern Rockies. Its members use

and will continue to use the Lewis and Clark National Forest for work and for outdoor recreation of all kinds, including fishing, hunting, hiking, horseback riding, and cross-country skiing. The Forest Service's unlawful actions adversely affect Native Ecosystems Council's organizational interests, as well as its members' use and enjoyment of the Lewis and Clark National Forest, including the Project area. Native Ecosystems Council brings this action on its own behalf and on behalf of its adversely affected members.

13. Plaintiff ALLIANCE FOR THE WILD ROCKIES is a tax-exempt, non-profit public interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and its naturally functioning ecosystems. Its registered office is located in Helena, Montana. The Alliance has over 2,000 individual members and more than 600 member businesses and organizations, many of which are located in Montana. Members of Alliance work as fishing guides, outfitters, and researchers, who observe, enjoy, and appreciate Montana's native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future, including in the Project area in the Lewis and Clark National Forest. Alliance's members' professional and recreational activities are directly

affected by Defendants' failure to perform their lawful duty to protect and conserve these ecosystems by approving the challenged Project. Alliance for the Wild Rockies brings this action on its own behalf and on behalf of its adversely affected members.

14. Defendant LESLIE WELDON is the Regional Forester for the Northern Region of the U.S. Forest Service, and in that capacity is charged with ultimate responsibility for ensuring that decisions made at the National Forest level in the Northern Region, including the Lewis and Clark National Forest, are consistent with applicable laws, regulations, and official policies and procedures. She is the highest official and representative of Defendant U.S. Forest Service in the District of Montana.

15. Defendant UNITED STATES FOREST SERVICE (Forest Service) is an administrative agency within the U.S. Department of Agriculture, and is responsible for the lawful management of our National Forests, including the Lewis and Clark National Forest.

V. PROCEDURAL BACKGROUND

16. On September 29, 2009, Judith District Ranger Ron Wiseman signed a Decision Notice/Finding of No Significant Impact authorizing implementation of the Project.

17. On April 27, 2010, Lewis and Clark Forest Supervisor Lesley Thompson dismissed Plaintiffs' administrative appeal, constituting the final agency action of the U.S. Department of Agriculture.

VI. SUMMARY OF LAW

NEPA Background

18. NEPA was enacted in 1969 to ensure procedural safeguards are in place before an agency takes action significantly affecting the human environment.

42 U.S.C. § 4332(2)(C).

19. The goal of NEPA is to ensure that agencies have the necessary information available to closely consider environmental impacts of a proposed project.

20. NEPA requires the Forest Service to prepare a full EIS for all "major Federal actions affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). If it is determined that an action will have "significant" impacts on the human environment, an EIS must be prepared.

21. Factors determining significance include the following: "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," 40 U.S.C. § 1507.27(b)(4), "[t]he degree to which the possible effects of the human environment are highly uncertain

or involve unique or unknown risks” 40 U.S.C. § 1507.27(b)(6) (2000) and “[w]hether an action is related to other actions with individually insignificant but cumulative significant impacts. 40 C.F.R. § 1508.27(b)(7) (2000). “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27 (b)(7) (2000).

22. Under NEPA, agencies are required to take a “hard look” at the potential environmental impacts of a proposed action.

23. NEPA’s “hard look” requires a thorough examination of a reasonable range of alternatives of the proposed action. 40 U.S.C. § 4332 (C)(iii).

24. NEPA mandates that the agency develop and evaluate alternatives to the proposed action. 42 U.S.C. § 4331 (C)(iii). The alternatives requirement is the “heart” of the NEPA and requires the acting agency to “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a).

25. “The NEPA process is intended to help public officials make decisions that are based on environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1 (c).

26. In taking a “hard look” at the environmental impacts of a project, an agency must rely on accurate scientific analysis. 40 C.F.R. § 1500.1 (b).

27. NEPA requires:

environmental information [be] available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.

40 C.F.R. § 1500.1(b).

28. NEPA requires that agency action ensure the “professional integrity, including the scientific integrity, of the discussions and analysis in Environmental Impact Statements.” 40 C.F.R. § 1502.24.

NFMA/Forest Plan Background

29. The National Forest Management Act creates a two-step process for the management of our national forests. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1376 (9th Cir. 1998). The Forest Service must first develop a Land Resource Management Plan (“Forest Plan”) for each unit of the National Forest System. 16 U.S.C. § 1604(f)(1). For individual management actions within a forest unit, all relevant plans, contracts, or permits must be consistent with each forest’s overall Forest Plan. *Id.* § 1604 (I). Thinning projects, timber sales, and fuel

reduction projects must be consistent with the relevant Forest Management Plan. *Id.*

30. The National Forest Management Act imposes substantive obligations on the Forest Service, including the requirement “to provide for diversity of plant and animal communities.” [16 U.S.C. § 1604\(g\)\(3\)\(B\)](#).

31. The National Forest Management Act 1982 regulations were promulgated to ensure such diversity mandate that the Forest Service maintain viable populations of species throughout the National Forests:

Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to ensure its continued existence is well distributed in the planning area. In order to ensure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.

36 C.F.R. § 219.19 (2000).

32. The NFMA 1982 regulations require that viability be ensured through the utilization of a quantitative inventory analysis:

Forest planning shall provide for diversity of plant and animal communities and tree species consistent with the overall multiple-use objectives of the planning area. Such diversity shall be considered throughout the planning process. *Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition.* For each planning alternative, the interdisciplinary

team shall consider how diversity will be affected by various mixes of resource outputs and uses, including proposed management practices.

36 C.F.R. § 219.26. (emphasis added)

33. These regulatory requirements apply both to the forest plans incorporating them as well as to site specific implementation of those plans.

16 U.S.C. § 1604(i).

34. This requirement for insuring species viability with quantitative data is in accord with the NFMA requirement for “continuous monitoring and assessment,” 16 U.S.C. § 1604(g)(3)(C), and the Forest Supervisor’s duty to “obtain and keep current inventory data appropriate for planning and managing” the forest’s resources, 36 C.F.R. § 212(d).

35. The NFMA regulations also mandate the Forest Service to designate certain species as “management indicator species” (“MIS”) to serve as proxies for groups of species with similar habitat needs in order to estimate the impacts of management activities on fish and wildlife populations and diversity. 36 C.F.R. § 219.19.

36. The MIS selected must fairly represent all major biological communities in order to fully disclose the potential impacts of management alternatives analyzed when proposing habitat modification. 36 C.F.R. § 219.19(a)(1).

37. Thus, when evaluating the potential environmental impacts of a proposed project -- in addition to considering the direct effects on habitat quality -- the Forest Service must also consider the indirect effects on the population trends of the selected MIS, as appropriate for project analysis. 36 C.F.R. § 219.19(a)(1).

38. The transition provision of the 2000 NFMA regulations require the Forest Service to consider the “best available science” when implementing site-specific projects within a forest plan. 36 C.F.R. § 219.35(a) (2001).

SUMMARY OF FACTS AND GENERAL ALLEGATIONS

Alternatives Considered in the Environmental Assessment

39. The Environmental Assessment (EA) considers only two alternatives in detail--an action alternative (Alternative B), and a no-action alternative (Alternative A). *EA*, 2-1 to 2-11.

40. Plaintiffs offered a second action alternative (Alternative C) as an alternate action option to Alternative B. *EA*, 2-1 to 2-11.

41. The Forest Service stated it did not consider Alternative C in detail because Alternative C allegedly did “not meet the purpose and need nor the desired condition of the project area since the alternative would treat

less than 50% of the entire project area and would not adequately modify wildfire behavior.” *DN*, 7.

42. After the Forest Service decided not to consider Alternative C in detail, the agency removed a significant portion of the original Project area.

43. The original proposed Project covered 1731 acres. EA, Ch. 2, 2. The appeal decision removed the “unroaded areas west of Forest Road 821 and south of Forest Road 825 (except for unit 12 which has a road through the unit)” from the project declaring that they “would not be implemented as part of this decision.” *Appeal Decision*, File 1570, 20.

44. The area removed from the project totaled 910 acres--leaving 821 acres--less than half the original project area.

45. After removing over half of the Project area, the Forest Service did not reconsider the range of alternatives in the EA and did not reconsider Alternative C.

Elk Winter Range

46. The Forest Plan, in Management Standard C-1, requires the incorporation of “recommendations from the Montana Cooperative Elk-Logging Study in the planning of timber sales and road construction projects.” *Forest Plan*, 2-30.

47. The Montana Cooperative Elk-Logging Study states that “[t]imbered areas adjacent to primary winter foraging areas should be managed to maintain the integrity of cover for elk. Where timber harvest is acceptable, slash cleanup and logging should be scheduled outside the winter period.” *Forest Plan*, Appendix F, F-9.

48. “The project area is mapped elk winter range.” *EA*, 3-M, 119.

49. The EA states:

[R]ecommendations from the Montana Cooperative Elk-Logging Study were considered for the Ettien Ridge Project[.] All recommendations were followed with the exception of the recommendation on winter ranges that logging be scheduled outside the winter period. *EA*, 3-M, p. 119

50. “[B]ig game would experience disturbance and displacement during project activities.” *EA*, 120.

51. The EA additionally found that:

Elk on winter range in western Montana preferred dense timber stands and larger trees for bedding cover. ... Timber areas that receive moderate to heavy elk bedding use prior to logging were not used for bedding during winters following heavy selection logging. Elimination of preferred bedding sites subject elk to decreased energy intake and increased energy output because of increased travel between suitable bedding and feeding sites. *EA*, Appendices F – 9.

Road Density in Management Area C

52. The Lewis and Clark Forest is divided into management areas.

53. Each management area has specific goals and standards to

guide the Forest Service in the management of resources and habitat in that region of the Forest.

54. Management Area C (MA-C) standards require the Forest Service to:

Maintain effective hiding cover percentages ... by timber compartment. ... Habitat effectiveness will be positively managed through road management and other necessary controls on resource activity. *Forest Plan*, 3-16.

55. MA-C standards of the Forest Plan address road density specifically and require that the Forest Service achieve “low” public access of motorized use. *Forest Plan*, 3-18.

56. The standard states that “[l]ow public access is defined as 0.5 to 1.5 miles of open road per square mile of area ... [so that] [e]lk habitat effectiveness will be maintained” in MA-C. *Forest Plan*, 3-18.

57. Currently there are only three motorized routes in the Etti Ridge MA-C Project area, including routes 6537, 6538 and J821.

58. There are 0.99 miles of route J821 in MA-C Project area, route 6538 includes 0.41 miles on MA-C Project area lands, and a portion of route 6537, or 0.18 miles, also falls within MA-C Project lands.

59. This totals 1.58 miles of open motorized routes.

60. The Project area contains 956 acres of MA-C land, which translates to 1.5 square miles (956 acres/640 acres per section = 1.5 square

miles).

61. Current open motorized routes total roughly one mile per section ($1.58 \text{ miles} / 1.5 \text{ square miles} = 1.05 \text{ miles per section}$) for the MA-C polygon.

62. Logging in MA-C requires the addition of several roads to the project area.

63. The final approved Ettien Ridge Project authorizes additional road mileage of 0.93 miles on route 6544, 0.73 miles on the route that provides access to harvest units 8-9, and 0.44 miles on the route running from J821 east to the forest boundary.

64. These additional road miles required for Project implementation total 2.1 miles.

65. When the new roads are added to the existing road mileage, the open roads in the MA-C lands of the Project would increase to 3.68 miles during Project implementation. This would produce a Project open road density of 2.45 miles per section ($3.68 \text{ miles} / 1.5 \text{ square miles} = 2.45 \text{ miles per section}$).

66. The Forest Service has tallied all the roads over all MA-C lands within the entire forest and determined that across the entire area of MA-C, which totals 65,710 acres, the average road density is 0.87 per square mile.

EA 3-M, Table 3-31, 120.

Big-Game Hiding Cover in Management Area C

67. The Forest Plan requires that elk habitat effectiveness be maintained or enhanced in MA-C. *Forest Plan*, 3-15.

68. The overall goal of MA-C is to “[m]aintain or enhance existing elk habitat by maximizing habitat effectiveness as a primary management objective. ... Commodity resource management will be practiced where it is compatible with these wildlife management objectives.” *Forest Plan*, 3-15.

69. To meet this goal the Forest Service is required to “[m]aintain or enhance important identified wildlife habitat, including ... big-game winter range, ... [and] raptor nesting sites.” *Forest Plan*, 3-15 The area of MA-C within the Project area is mapped big-game winter range *EA*, 3-M, 119, and goshawk habitat.

70. The Project approved timber harvest in Management Area C.

71. The Forest Service is required to “[m]aintain effective hiding cover percentages by timber compartment at an average of 40 percent with a minimum of 35 percent for any individual sub-compartment.” *Forest Plan*, 3-15.

72. “Effective hiding cover” is defined as “[v]egetation capable of essentially hiding an adult elk from the view of [sic] at a distance equal to or

less than 200 feet.” *Forest Plan*, glossary, 5.

73. The Forest-Wide Management Standard for wildlife of the L&CNF requires “a big-game cover analysis of projects involving significant vegetation removal to ensure that effective hiding cover is maintained.” *Forest Plan*, 2-30.

74. To comply with this Forest Plan requirement, in 2008 the Forest Service developed and implemented “Process for analyzing Big-Game Cover, as required by Lewis and Clark National Forest Plan, Management Standard C-1 (5), January 2009” (hereinafter “BGC analysis”) as the methodology for assessing big-game cover throughout L&CNF. *See Letter to File, File Code: 1950/2600*, February 9, 2010.

75. The Forest Plan states “[t]he cover analysis should be done on a drainage or elk herd unit basis.” *Forest Plan*, 2-30.

76. The BGC analysis states that the Lewis and Clark National Forest is:

divided into Watersheds and Subwatersheds, or drainages, that are identified by the Hydrologic Unit Code, or HUC. A Watershed encompasses 40,000 to 250,000 acres and is identified as HUC5, or fifth code HUC. A Subwatershed [or drainage] is from 10,000 to 40,000 acres in size and is called a sixth code HUC (HUC6). The Lewis and Clark National Forest has further broken out HUC6 Subwatersheds into HUC7, which are 3,000 to 10,000 acres in size. *Process for Analyzing Big-Game Cover, As Required by the Lewis and Clark National Forest Plan, Management Standard C-1*, p. 1. (emphasis added).

77. The Forest Service used HUC7s because “many of the HUC6 are large, include mostly elk winter range, and include mostly private lands.” *BGC Analysis*, 2.

78. The Forest Service states “[c]hoosing the HUC7 in this way also limits the amount of private land for which we would need to develop data to determine PI types [elk cover percentage].” *BGC Analysis*, 2.

79. The Forest Service conducted two different assessments of hiding cover.

80. The first methodology was used in conducting the first and second Biological Evaluations for the Project.

81. The Forest Service used the “sight distance” methodology in the 2006 and 2007 Biological Evaluations. *Biological Evaluation – Ettien Ridge Fuels Reduction Project*, File Code 1950, (Sept. 7, 2007); *Biological Evaluation – Ettien Ridge Fuels Reduction Project*, File Code 1950 (June 7, 2006).

82. Sight distance is measured by “vegetation capable of hiding an adult elk from the view of [sic] at a distance equal to or less than 200 feet.” *Forest Plan*, Glossary, 5.

83. The second methodology was included in the EA and used “photo interpretation” types (hereinafter “PI types”). *EA*, 3-M, p. 119-120;

Ettien Ridge Project Hiding Cover Analysis, File Code 2630, (Apr. 10, 2009).

84. The results of these two different assessments vary drastically.

85. The Forest Plan incorporates the recommendations of the Montana Cooperative Elk Logging Study conducted by the Forest Service in 1982.

86. The Montana Elk Logging Study found that while PI types are the most widely used method, their results are unreliable and can vary as much as 70 percent over the same study area “using different interpretation of photographs. Even the most commonly used methods [of photo interpretation] ... can be used in a wide variety of ways.” *Montana Cooperative Elk-Logging Study*, U.S.D.A. Forest Service, Northern Region, 74 (August, 1982).

Goshawk Monitoring and Viability

87. The Forest Plan requires the Forest Service to monitor population levels of all Management Indicator Species on the forest and determine the relationship to habitat trends. *Forest Plan*, 2-37.

88. The goshawk is a management indicator species on the Lewis and Clark National Forest. *Forest Plan*, 2-37.

89. The State of Montana has recently upgraded the goshawk to an S3 species, which is identified as a species “potentially at risk because of limited and/or declining numbers, range, and/or habitat.”

90. The Forest Plan requires the Forest Service to annually monitor all active nesting territories of the goshawk and to take further action if there is a 10 percent or more decrease in active nesting territories:

- With the implementation of the Forest Plan, monitoring of management indicator species of wildlife and fish will assume increased emphasis. This will involve annual field surveys of selected raptor nesting sites as well as recurrent inventories of habitat quantity and quality for cavity-dependent species.

Forest Plan, Appendix M, M-1.

- Monitor population levels of all Management Indicator Species on the Forest and determine the relationship to habitat trends. Population levels will be monitored and evaluated as described in the monitoring plan (Chapter V).
- 100% sample annually for active nesting territories. Reporting period: annually.

Forest Plan, 5-11.

- Variability which would initiate further review: Decrease of 10% or more in active nesting territories.

Forest Plan 2-37.

91. The Forest Service issued a goshawk monitoring report in September 2007 that shows there was a 14% decrease in active nesting territories between 2006 and 2007. *Project File, Section F, 004.*

92. The Forest Service did not initiate further review.

93. Instead, the June 2007 monitoring report states that “a decrease in 10% or more in active nest territories does not appear to provide a reasonable threshold for further evaluation of management activities.”

Project File, Section F, 005.

94. A draft 2006 monitoring report noted problems with methodology as one reason why the 10% decrease would not provide a reasonable methodology:

This could be due to insufficient time spent looking for activity in the territory, surveys at the time of year the birds are virtually silent (beginning of nesting), surveys conducted later in the season after a nesting attempt failed, or because the territory is no longer active. Due to a variety of reasons a territory may be determined to be “inactive” in any given year and the inconsistent methodology used to monitor each year, this monitoring item does not adequately determine if a change is needed in the Forest Plan.

Project File, Section F, 019.

95. The draft 2006 monitoring update recommended:

- Update and validate 1998 Lewis and Clark nesting habitat model. Look at changing variables to the model to include more nest sites.

- Use existing stand exam data and collect new stand exam data around known nest sites to further refine and validate a nesting model for the Jefferson Division of the Lewis and Clark National Forest.

Project File, Section F, 019.

96. The Forest Service released a “monitoring summary” in 2008. *Project File*, Section E, 128.
97. The “monitoring summary” is a one page spreadsheet. *Project File*, Section E, 128.
98. Unlike the 2007 reports, the 2008 spreadsheet does not contain a habitat analysis section. *Project File*, Section E, 128.
99. The 2008 summary indicates the Forest Service did not sample 100% of the active nesting sites in 2008, nor has the agency surveyed 100% of the active nesting sites in a single year within the last ten years. *Project File*, Section E, 128.
100. According to the 2008 monitoring summary, there was a 25% decrease in nesting territories between 2007 and 2008. *Project File*, Section E, 128.
101. The 2008 spreadsheet makes no reference to further review. *Project File*, Section E, 128.
102. The June 2007 report states that “goshawk select mature forest at a higher percent than it occurs on the landscape.” *Project File*, Section F 005.
103. Goshawk nesting habitat is often stands with dense, high canopy cover. *EA*, 3M-111.

104. The Ettien Ridge Fuels Project will result in the loss of 114 acres of nesting habitat and 331 acres of possible nesting habitat. *EA*, 3M-115.

Goshawk Foraging Habitat

105. Goshawk foraging habitat is described as mature to late seral stands with at least 40% canopy cover in dominant trees and an open understory. *EA*, 3M-111.

106. Food availability and forest structure appear to be the most ubiquitous factors limiting goshawks. *Appeal Appendix A-159*.

107. Stands proposed for thinning in the Project area are presently at 60-85% canopy cover. *EA*, 3M-114.

108. One study found that more than two-thirds of goshawk prey species occur in greater densities when canopy cover is greater than 40%. *See Appeal Appendix, A-157*.

109. The Amended Silviculture Report stated that canopy cover after thinning would typically be less than 40 percent. *Amended Silviculture Report*, 7.

110. Nonetheless, the EA determined that “habitats resulting from implementation would provide for a wide variety of prey species,” and “[t]he proposed treatments do not alter the foraging habitat percentages[.]”

EA, 3M-114.

Red-Tail Hawk Competition

111. The 2007 goshawk monitoring report acknowledges that “goshawk select mature forest at a higher percent than it occurs on the landscape.” *Project File*, Section F 005.

112. Studies have shown that raptors such as red-tailed hawks replace goshawks in timber harvesting areas that increase openings and low-density forests, but do not replace goshawks in unharvested areas. *Appeal Appendix A-40*; *see also, Appeal Appendix A-112, 114-116*.

113. The EA determined there was a low potential for increasing the risk of goshawk predation or competition from more open-forest species because the project was not designed to reduce canopy cover below 40%. *EA, 3M-116*; *see also, EA, 3M-114*.

114. The Amended Silviculture Report and the EA acknowledge that canopy cover post-treatment would typically be less than 40%. *Amended Silviculture Report, 7*; *see also, EA, 3-11*.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Forest Service violated NEPA by failing to consider a reasonable range of alternatives after a change in circumstances.

115. All previous paragraphs are incorporated by reference.

116. The EA includes an action alternative (Alternative B) and a no-action alternative (Alternative A).

117. Plaintiffs suggested a third alternative (Alternative C).

118. Plaintiffs proposed Alternative C because Alternative B, the only action alternative, is in violation of the Forest Plan. In contrast, Alternative C does not violate the Forest Plan.

119. The Forest Service did not consider Plaintiffs' Alternative C in detail on the grounds that it did not fit the purpose and need of the project because it was less than half the size of Alternative B. *DN*, 7.

120. The DN was appealed administratively by Plaintiffs. In the appeal decision, dated December 23, 2009, the Forest Service decided to drop over half the acreage of the original project. *Appeal Decision*, 20.

121. The Forest Service did not reconsider the original range of alternatives nor did it reconsider Alternative C.

122. Failure to consider a viable alternative renders an environmental assessment inadequate.

123. The failure to consider a reasonable range of alternatives and failure to account for a change in circumstances in the alternatives considered is a violation of NEPA.

SECOND CLAIM FOR RELIEF

The Forest Service violated the Forest Plan and NFMA by allowing logging during the winter period on elk winter range.

124. All previous paragraphs are incorporated by reference.

125. The Project area is mapped elk winter range.

126. The Forest Plan requires incorporation of recommendations from the Montana Cooperative Elk-Logging Study.

127. The Montana Cooperative Elk-Logging Study states that “[w]here timber harvest is acceptable, slash cleanup and logging should be scheduled outside the winter period.” *Forest Plan*, Appendix F, F-9.

128. The project will harvest timber in elk winter range during winter. *EA*, 3M-119.

129. The Forest Service violated the Forest Plan and NFMA by allowing logging in mapped elk winter range during winter months.

THIRD CLAIM FOR RELIEF

The Forest Service violated the Forest Plan and NFMA by failing to measure elk hiding cover at the drainage level.

130. All previous paragraphs are incorporated by reference.

131. The Forest Plan requires an analysis of cover for big-game where a project involves significant vegetation removal. *Forest Plan*, 2-30.

132. The big-game cover analysis aims to ensure that effective hiding cover is maintained during timber harvests. *Forest Plan*, 2-30.

133. MA-C requires that the Forest Service “[m]aintain or enhance existing elk habitat by maximizing habitat effectiveness as a primary management objective.” *Forest Plan*, 3-15.

134. In MA-C, the Forest Service must “[m]aintain effective hiding cover ... percentages by timber compartment at an average of 40 percent with a minimum of 35 percent (or the natural level if less than 35 percent) for any individual sub-compartment.” *Forest Plan*, 3-16.

135. The big-game cover analysis must be done on a drainage or elk herd basis. *Forest Plan*, 3-16.

136. The Forest Service analyzed big-game cover at a scale smaller than a drainage (3,000 to 10,000 acres), instead of the drainage level (10,000 to 40,000 acres).

137. The Forest Service violated the Forest Plan and NFMA by failing to analyze big-game cover on a drainage level.

FOURTH CLAIM FOR RELIEF

The Forest Service failed to take a “hard look” at the Project’s effects by using inaccurate scientific methodology in its big game habitat analysis in violation of NEPA.

138. All previous paragraphs are incorporated by reference.

139. The “hard look” requirement demands that the Forest Service rely on accurate scientific analysis in determining a Project’s effects on the environment. 40 C.F.R § 1500.1(b).

140. “Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 C.F.R. § 1500.24.

141. The Forest Service thus may not rely on incorrect assumptions or data. 40 C.F.R. § 1500.1(b).

142. The Forest Service failed to ensure the professional and scientific integrity of data by analyzing big-game hiding cover at a scale smaller than the drainage. The incorrect scale of analysis leads to inaccurate results in assessing the environmental impacts of the projects.

143. The Forest Service failed to ensure the professional and scientific integrity of the big-game hiding cover analysis by using data derived from a scientific methodology the agency itself deemed less reliable than the readily available, previously calculated data.

144. The Forest Service violated NEPA by relying on inaccurate scientific assessments or unreliable scientific data in assessing the impacts of the Project on big game habitat.

FIFTH CLAIM FOR RELIEF

The Forest Service violated the Forest Plan and NFMA by allowing for roads in MA-C to increase to a density greater than 1.5 miles per square mile of area.

145. All previous paragraphs are incorporated by reference.

146. The Forest Plan only allows timber harvest in MA-C where it can be done in a way that is compatible with MA-C wildlife standards.

147. The MA-C standards limit the amount of open roads to a maximum of 1.5 miles of open road per square mile of area but the Project will increase road density in the Project area to 2.45 miles of open road per square mile.

148. The Forest Service impermissibly calculated road density by finding the average road density of all MA-C lands across the entire forest. *EA*, 3-M, Table 3-30, p. 120.

149. The Forest Service's analysis of open road density violated the Forest Plan and NFMA.

SIXTH CLAIM FOR RELIEF

The Forest Service violated the Forest Plan and NFMA by failing to follow Forest Plan standards for goshawk monitoring.

150. All previous paragraphs are incorporated by reference.

151. The Forest Service failed to ensure that the Project is consistent with the Forest Plan by failing to survey 100 percent of active nest areas; failing to issue a habitat analysis along with its 2008 “monitoring summary”; and by failing to initiate further review for goshawk habitat effectiveness after determining there was a decrease of 10% or more in active nesting territories between 2006 and 2007, and a decrease of 25%, between 2007 and 2008, and approving this Project that eliminates 445 acres of potential and actual nesting habitat despite decreasing goshawk territories in the Forest and decreasing populations in the State of Montana as a whole.

152. The Forest Service’s assertion that the 10% decrease threshold is not an effective means of monitoring goshawk populations is not entitled to any deference because it is contrary to the plain language of the Forest Plan and thus contrary to law unless and until the Forest Plan is amended to remove that threshold.

153. The Forest Service’s failure to ensure proper monitoring of goshawks violated the Forest Plan and NFMA. These monitoring failures rendered the site-specific impacts to goshawks from this Project illegal under NFMA and the Forest Plan.

SEVENTH CLAIM FOR RELIEF

The Forest Service violated the NFMA and NEPA because its goshawk

monitoring methodology is invalid.

154. All previous paragraphs are incorporated by reference.

155. Monitoring results determined that goshawk select mature forest at a higher percent than it occurs on the landscape and goshawk select mature and old growth forests disproportionately to their availability for nesting.

156. Despite monitoring results that indicated a decrease in active nest territories, the Ettien Ridge project would further reduce the amount of nesting habitat available for goshawks in the project area.

157. The Forest Service has admitted that its nest monitoring protocol is not scientifically reliable.

158. In addition to failing to address the admitted flaws in the model itself, the Forest Service is also failing to conduct the complete annual Forest-wide monitoring required by the Forest Plan, and failing to initiate further reviews envisioned by the Forest Plan to determine the cause of the decreasing active nest territories.

159. In light of these flaws in methodology, the agency's analysis violates NFMA because the Forest Plan is invalid because it fails to ensure enough habitat is available to maintain viable populations of goshawks. Additionally, the Forest Service's failure to implement a scientifically

reliable monitoring protocol also violates NEPA's requirement that the agency act with scientific integrity in NEPA analysis.

160. Defendant Leslie Weldon, in her official capacity, failed to ensure that the Project decision was consistent with applicable laws, regulations, and official policies and procedures regarding the Northern Goshawk.

EIGHTH CLAIM FOR RELIEF

The Forest Service violated NEPA by failing to provide high quality information and failing to insure accurate scientific analysis and integrity.

161. All previous paragraphs are incorporated by reference.

162. The Environmental Assessment's determinations of the amount of canopy cover that would remain post-treatment are internally inconsistent.

163. The different canopy cover determinations undermine the agency's conclusions regarding goshawk foraging habitat and the increased risk of competition and therefore cannot satisfy NEPA's requirement of high quality information, accurate scientific analysis, and scientific integrity.

REQUEST FOR RELIEF

Plaintiffs request that this Court award the following relief:

- A. Declare that the Forest Service is violating NFMA and NEPA because the Project violates Forest Plan requirements regarding elk winter

- range, big-game hiding cover in MA-C lands, open road density in MA-C lands, and goshawk monitoring requirements;
- B. Declare that the Forest Service is violating NEPA because the Project EA is insufficient, fails to consider a reasonable range of alternatives, and employs inaccurate science in assessing the environmental impacts of the project;
- C. Declare that the Forest Service must withdraw the Project, or alternatively complete a full environmental impact statement for the Project;
- D. Enjoin implementation of the Project;
- E. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under EAJA; and
- F. Grant Plaintiffs such further relief as may be just, proper, and equitable.

DATED this 25 Day of May, 2010.

/s/ K. E. Purcie Bennett
COTTONWOOD ENVIRONMENTAL LAW
CENTER
24 S. Wilson Avenue, Suite 6-7
Bozeman, MT 59715
Ph: (406) 587-5800
Purcie@cottonwoodlaw.org

/s/ John Meyer
COTTONWOOD ENVIRONMENTAL LAW
CENTER
24 S. Wilson Avenue, Suite 6-7
Bozeman, MT 59715
Ph: (406) 587-5800
John@cottonwoodlaw.org

Attorneys for Plaintiffs