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

NATIVE ECOSYSTEMS COUNCIL,
and ALLIANCE FOR THE WILD
ROCKIES,

Plaintiffs,

vs.

LESLIE WELDON, Regional Forester
of Region One of the United States
Forest Service, and UNITED STATES
FOREST SERVICE, an agency of the
United States Department of
Agriculture,

Defendants.

CV -

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

I. INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act of the U.S. Forest Service's March 10, 2011 Record of Decision approving the Beaver Creek Landscape Management Project (Project or Beaver Creek Project) in the Ashland Ranger District of the Custer National Forest, the Custer National Forest Land & Resource Management Plan (Forest Plan) and the Custer National Forest Fire Management Plan (Fire Plan). Plaintiffs Alliance for the Wild Rockies and Native Ecosystems Council attest that the final decisions approving the Project, approving and implementing the Forest Plan, and approving and implementing the Fire Plan are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.
2. The Project ROD authorized 10,508 acres of management activities, including 1,487 acres of commercial logging with hundreds of acres of modified clearcuts, the construction or re-construction of 35.2 miles of roads, and 8,054 acres of prescribed burning. Defendants' 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.*

3. Plaintiffs seek declaratory and injunctive relief to protect Plaintiffs' interests at law, including their interests that the Forest Service comply with NEPA's mandate to consider and disclose environmental impacts, and comply with NFMA's mandate to protect biodiversity.
4. Plaintiffs request that approval of the Project be set aside pursuant to 5 U.S.C. § 706(2)(A) and (D), and that the Court enjoin the Forest Service from implementing this Project until Defendants comply fully with NEPA, NFMA, and APA.
5. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs of suit, including attorney and expert witness fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and such other relief as this Court deems just and proper.

II. JURISDICTION

6. This action arises under the laws of the United States and involves the United States as a defendant. Therefore, this Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 28 U.S.C. §§ 1331, 1346. An actual controversy exists between Plaintiffs and

Defendants. Plaintiffs use and enjoy the Custer National Forest, including the Ashland Ranger District, 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 area on an ongoing basis in the future.

7. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs have been and will be adversely affected and irreparably injured if Defendants implement the Project. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NFMA, NEPA, and 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 & 706.
8. Plaintiffs fully participated in the administrative review process, and have exhausted administrative remedies. Defendants have declared that the denial of Plaintiffs' administrative appeals was the final administrative action 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

9. Venue in this case is proper under 28 U.S.C. § 1391(e) and LR 3.3(a)(1). Defendant Weldon, an officer of the U.S. Forest Service with its Region One office in Missoula, resides within the Missoula Division of the United States District Court for the District of Montana, and is the principal representative in this District of Defendant U.S. Forest Service (Forest Service). The challenged decision was upheld by the Regional Forester, and is representative of official policies and procedures common to Region One. In Plaintiffs' first challenge to an earlier version of this Project, this Court found venue proper in this District and Division. *Native Ecosystems Council v. Tidwell*, CV-09-68-M-DWM-JCL, Order Denying Defendants' Motion to Transfer Venue, Document 15 (Aug. 13, 2009).

IV. PARTIES

10. Plaintiff NATIVE ECOSYSTEMS COUNCIL (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 Custer 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 Custer National Forest, including the Project area. Native Ecosystems Council brings this action on its own behalf and on behalf of its adversely affected members.

11. Plaintiff ALLIANCE FOR THE WILD ROCKIES (Alliance) 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, many of whom reside in Montana. Members of the Alliance include individuals who work as fishing guides, outfitters, and researchers with vocational interests in the natural heritage of the Northern Rockies, and also include residents 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. 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 and plans.

12. 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 (unit) level in the Northern Region are consistent with applicable laws, regulations, and official policies and procedures. Defendant Weldon is the highest level representative for the U.S. Forest Service in the District of Montana.
13. Defendant UNITED STATES FOREST SERVICE is an administrative agency within the U.S. Department of Agriculture, entrusted with the management of our National Forests.

V. PROCEDURAL BACKGROUND

14. On March 20, 2008, the Forest Service released a draft Environmental Assessment (EA) for the Whitetail Hazardous Fuels Reduction Project (Whitetail Project). The Forest Service did not accept public comment on the draft EA, and instead allowed the public to file only a formal “objection” to the proposed project in a “pre-decisional administrative review process” as described under the Healthy Forest Restoration Act (HFRA).

15. Plaintiffs filed a timely joint “objection” to the Whitetail Project on April 21, 2008.
16. On June 27, 2008 Elizabeth McFarland, District Ranger of the Ashland Ranger District of the Custer National Forest, released the final EA and signed the Decision Notice/Finding of No Significant Impact approving the Whitetail Project.
17. The Forest Service did not publish a draft EIS for the Whitetail Project and accept public comments on that document. It did not publish agency responses to draft EIS comments in a final EIS. It did not allow administrative appeals of the decision approving the Whitetail Project.
18. The Forest Service’s use of the HFRA exemption from required NEPA and Appeals Reform Act procedures was improper because the Whitetail Project did not fall within the scope of activities outlined in the HFRA.
19. The HFRA only authorizes projects on federal lands within the “Wildland Urban Interface” as defined either by a community wildfire plan or by the HFRA itself. The Powder River County Wildfire Protection Plan did not define which federal lands fall within the Wildland Urban Interface, thus the Whitetail Project was not within the Wildland Urban Interface as defined by the community wildfire plan. Additionally, the Whitetail Project area was

not within 1.5 miles of an “at-risk community” as defined by HFRA because the nearest community, Ashland, Montana, is 17 miles away.

20. Moreover, the HFRA only authorizes projects that focus on removing small diameter trees and retaining large trees and old growth habitat. The Whitetail Project did not fall within these parameters. There is already zero percent old forest in the area and the Whitetail Project would have allowed hundreds of acres of modified clearcutting of the oldest forest remaining in the area. The Whitetail Project also authorized removal of large seedtrees, and commercial thinning on hundreds of acres of the oldest forest in the area, which would have removed large overstory trees to at most 40% canopy closure. There was no diameter limit on any of the commercial logging authorized by the Whitetail Project.
21. Thus, the Whitetail Project did not fall within the scope of the HFRA exemption from NEPA and ARA because it was not within the Wildland Urban Interface and did not focus on removing small trees and retaining large trees and old growth habitat. In light of the Forest Service’s illegal invocation of HFRA, the Forest Service’s failure to comply with the notice, comment, and appeal requirements of NEPA and ARA was contrary to law.
22. The Whitetail Project area was directly adjacent to, and even overlapping

with, the 4,276 acre project area for the East Otter Hazardous Fuels Reduction Project (East Otter Project).

23. The East Otter Project on the Ashland Ranger District of the Custer National Forest was originally approved by Decision Memo on March 16, 2007 under a now-invalidated categorical exclusion from NEPA analysis.
24. The East Otter Project was re-proposed on October 9, 2008, withdrawn again, and then proposed for a third time on April 1, 2009.
25. At the time the Whitetail Project was approved, the East Otter Project had tentatively authorized 9.5 miles of road construction and re-construction and approximately 900 acres of commercial logging, including almost 300 acres of modified clearcutting.
26. The Whitetail EA did not disclose the location, logging acreage, road construction/reconstruction acreage, or quantitative and qualitative cumulative impacts of the East Otter Project, a commercial logging project that would have occurred simultaneously with, and directly adjacent to, the Whitetail Project.
27. Both the Whitetail and East Otter Projects were “hazardous fuels reduction” projects approved under the HFRA. Both project areas had the same current

and desired conditions. Both projects had the same purpose, need, and management prescriptions, including hundreds of acres of commercial logging in mature forest and miles of road building and re-construction.

28. Despite the simultaneous planning periods, the directly adjacent project areas, and the identical purposes, needs, and management prescriptions, the Forest Service did not disclose and analyze the cumulative impacts of the Whitetail Project and East Otter Project in the EA for the Whitetail Project. Moreover, the Forest Service failed to analyze these projects as cumulative actions in a single EIS.
29. The Forest Service's failure to address the cumulative impacts of the East Otter and Whitetail Projects, either in the Whitetail EA or in a single EIS for both projects, violated NEPA.
30. Because the Forest Service disclosed so little information to the public in the Whitetail EA, Plaintiffs filed a request with the Forest Service under the Freedom of Information Act in order to receive the withheld information regarding the environmental effects of the Whitetail Project.
31. The Forest Service did not provide the requested documents to Plaintiffs until after Plaintiffs filed a lawsuit in federal court alleging violation of the

Freedom of Information Act. *See* CV-09-15-D-DWM (D. Mont.)

Documents 1, 6.

32. After reviewing the full agency project record for the Whitetail Project, Plaintiffs filed litigation challenging the Whitetail Project on May 24, 2009.
33. In their Second Claim against the Whitetail Project, Plaintiffs argued that the Forest Service had to address the cumulative impacts of the East Otter and Whitetail Projects in a single EIS.
34. In their Fourth Claim against the Whitetail Project, Plaintiffs argued that the Whitetail Project did not fall within the permissible scope of the HFRA, and therefore the Forest Service had to comply with the normal NEPA and ARA notice, comment, and appeal procedures for the Whitetail Project.
35. On July 14, 2009, Defendants filed a motion to change venue for the Whitetail Project case from the Missoula Division to the Billings Division of the District of Montana.
36. On August 13, 2009, this Court denied Defendants' motion. *Native Ecosystems Council v. Tidwell*, CV-09-68-M-DWM-JCL, Order Denying Defendants' Motion to Transfer Venue, Document 15 (Aug. 13, 2009).
37. On September 14, 2009, the Forest Service withdrew its decision approving

the Whitetail Project. The Forest Service did not disclose the reason for the withdrawal.

38. On October 6, 2009, the parties stipulated to dismissal of CV-09-68-M-DWM-JCL.
39. On January 28, 2010, the Forest Service sent out a scoping notice for the Beaver Creek Project.
40. On October 15, 2010, the Forest Service released a Draft EIS for the Beaver Creek Project, in which the Forest Service explained that the Beaver Creek Project “includes treatments previously proposed as the Whitetail Hazardous Fuels Reduction Project, and East Otter Hazardous Fuels project.”
41. The EIS for the Beaver Creek Project was not prepared under the HFRA.
42. Plaintiffs submitted timely comments on the draft EIS for the Beaver Creek Project.
43. On March 10, 2011, the Forest Service signed the ROD approving the Beaver Creek Project.
44. Plaintiffs filed timely administrative appeals of the ROD with Defendant Weldon’s office in Missoula, Montana.

45. On May 17, 2011, prior to the final appeal decisions, the Forest Service notified the Alliance that the Forest Service would advertise the timber sale on or around June 16, 2011.
46. The Forest Service also notified the Alliance that the Forest Service would award the timber sale on or around July 16, 2011.
47. On May 18, 2011, Plaintiffs sent the Forest Service a 60 day notice of intent to sue under the Endangered Species Act.
48. On June 16, 2011, the Forest Service denied Plaintiffs' administrative appeals.
49. On June 24, 2011, Plaintiffs sent the Forest Service a first amended 60 day notice of intent to sue under the Endangered Species Act.

VI. FACTUAL ALLEGATIONS

A. Project Area

50. The Project area consists of approximately 14,053 acres of National Forest lands on the Ashland Ranger District of the Custer National Forest in Montana. The Ashland Ranger District varies from rolling prairie to steep rocky outcrops and dense stands of ponderosa pine forest. The Ranger District is popular with hunters.

51. The Ashland Ranger District has the largest grazing program of any National Forest in the country, and the Forest Service has described it as “an island of ponderosa pine forest surrounded by range land.”
52. Located approximately 17 miles to the southwest, Ashland, Montana is the closest community to the Project area. Ashland, Montana is located within Powder River County, a ranching area populated with less than one person per square mile.
53. There are six active colonies of the sensitive black-tailed prairie dog within the Project area.
54. The Project area provides year-long habitat for elk.
55. Among other species, the Project area also provides potential habitat for the northern goshawk (a Custer National Forest old growth habitat management indicator species and Montana Species of Concern) and the endangered black-footed ferret.
56. Logging and grazing activities have occurred within the Project area and on federal and private land within the Ashland Ranger District.
57. The Forest Service has not quantified the amount of logging and grazing that has occurred on any of the private lands within the Ashland Ranger

District. However, aerial photographs indicate substantial logging and substantial crop production on these private lands.

58. The Forest Service admits that potential and actual goshawk habitat on the Ashland Ranger District has declined since the Custer Forest Plan was approved in 1986.
59. Most of remaining potential goshawk habitat on the Custer National Forest is concentrated in the northern portion of the Ashland Ranger District, which is where the Project area is located.
60. The Custer National Forest does not have any forest stands designated to be conserved as old growth habitat.
61. According to the Forest Service, the Project area currently has 0% old growth forest.
62. The Forest Service admits that mature forest habitat is at historically low levels on the Ashland Ranger District due to past wildfires and logging activities.
63. The Forest Service has conceded that there is “relatively limited habitat for [mature forest] dependent species.”
64. Open motorized route density in the Project area is 1.43 miles per square

mile.

65. The open motorized route density provided in the FEIS excludes roads designated for administrative use only.
66. The open motorized route density provided in the FEIS excludes roads designated as Maintenance Level 1 roads.
67. The Project area currently has 16% of the acreage in elk “security areas.”
68. For the Project, the Forest Service calculated “security areas” or “secure areas” as all areas outside a 0.5 mile buffer from an open motorized route, regardless of size.
69. For the Custer National Forest Travel Plan, the Forest Service calculated “security areas” or “secure areas” as all areas outside a 0.5 mile buffer from an open motorized route, regardless of size.
70. Using the Montana Fish, Wildlife, and Parks’ definition of big game hiding cover as areas with tree canopy cover above 40%, the Forest Service estimated that the Project area currently has 26% hiding cover. The FEIS refers to this FWP hiding cover estimate as “security cover.”
71. The Forest Service estimated FWP hiding cover by using satellite imagery through the VMAP system.

72. Region One of the Forest Service has published a report that maintains that the VMAP model for the Custer National Forest is 63% accurate.
73. The Forest Service did not assess the amount of hiding cover for elk in the Project area using the Forest Service definition of capable of concealing 90% of an elk at 200 feet.
74. There are several roads located near streams in the Project area that are contributing to stream sedimentation in the Project area.
75. Streams in the Project area are “functional at risk” and vulnerable to degradation.
76. Otter Creek and the Tongue River, which are downstream from the Project area, are listed on Montana's Clean Water Act Section 303(d) list of impaired waters.
77. Beaver Creek and Little Pumpkin Creek are also listed on the Montana 303(d) list although they have not been adequately assessed for impairments to beneficial uses.
78. Among the probable sources of impairment for these waterbodies are roads and grazing.
79. The Forest Service has repeatedly violated state best management practices

in the area regarding stream sedimentation from ground-disturbing management activities.

B. Project

80. The Forest Service estimates that the Project will take five to ten years to implement. The EIS fails to disclose the historic levels of old growth forest in the Project area and Ranger District.
81. The EIS does not disclose the quantity and quality of old growth forest necessary to sustain viable populations of dependent wildlife species in the area.
82. The EIS discloses that the Project will result in a net loss to the federal taxpayers of over one million dollars.
83. The EIS does not disclose the acreage or percentage of the Project area that will be available as elk security areas during the five to ten year operation period for the Project.
84. The Project will eliminate 800 acres of FWP hiding cover in the area.
85. The Project will reduce the percentage of FWP hiding cover in the Project area (i.e. "security cover") to 22% of the Project area.
86. The Project will increase open motorized route density in the Project area to

at least 2.45 miles/sq. mile during Project implementation.

87. This during-Project open motorized route density of 2.45 miles/sq. mile does not include roads designated for administrative use only or non-system (i.e. unauthorized) motorized routes that are open for motorized use because the Forest Service does not disclose those figures in the EIS.
88. It is not possible to present an accurate portrait of habitat effectiveness in the Project area during the Project without the figures the EIS fails to disclose.
89. The Project does not prohibit mechanized activities in the Project area during the elk winter range period (November 30 to June 15) or the elk calving period (June 1 to July 1).

VII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Project and Forest Plan violate NFMA.

90. All above paragraphs are incorporated by reference.
91. Under NFMA, the Forest Service must protect the diversity of, and ensure the viability of, native wildlife species across the Forest.

A. The Forest Service is not ensuring the viability and diversity of old growth dependent wildlife species on the Custer National Forest, as required by NFMA.

92. The Custer Forest Plan has no standard for the conservation of old growth habitat on the Custer National Forest. The forest plans for all other National Forests in Region One of the U.S. Forest Service require the conservation of some percentage of old growth habitat in order to ensure the viability of old growth dependent wildlife species.
93. The Project area currently has 0% old growth habitat.
94. The Project will allow commercial logging of some of the oldest forest and largest trees remaining in the Project area, which could eventually become old growth habitat.
95. The Project does not comply with the management recommendations for the Custer National Forest old growth management indicator species, the northern goshawk.
96. The Custer National Forest is not ensuring or maintaining a viable population of goshawks on the Ashland Ranger District.

B. The Forest Service is not ensuring the viability and diversity of big game species on the Custer National Forest, as required by NFMA.

97. The Custer Forest Plan has no standard for the conservation of elk/big game

hiding cover or security on the Custer National Forest: there is no security block standard, no hiding cover standard, and no road density/habitat effectiveness standard.

98. The forest plans for all other east-side National Forests in Region One of the U.S. Forest Service have some kind of quantitative road density or cover standard for big game habitat conservation.
99. The Project area already fails all thresholds set by the best available science for security blocks, hiding cover, and road density/habitat effectiveness.
100. The increase in road density during the five to ten year period of Project implementation, as well as the reduction in hiding cover from logging, will exacerbate the current situation and further degrade the elk habitat in the Project area below scientific thresholds.
101. Finally, the Forest Service violates NFMA (via Forest Plan violation) by failing to even assess elk hiding cover in the FEIS using the actual Forest Service Forest Plan definition. This failure also violates NEPA.

C. The Project violates the visual quality objective standards from the Forest Plan.

102. Even after mitigation, the Forest Service admits in the FEIS that hundreds of acres of the Project area will not meet the Forest Plan visual quality

objective standards of “Retention” and “Partial Retention” for several years after Project implementation.

103. The Forest Service further admits in the FEIS that when this Project is viewed cumulatively with other proposed logging projects in the vicinity, i.e. Timber Creek, Liscom Butte, and Home Creek prescribed burns, Fly-Wilbur post sale activities, the Threemile project, the Fifteen Elk project, and the Cow Creek fuels project, the Forest Plan visual objective standards will not be met.
104. Forest Plan standards are legally binding and a failure to comply with them is a violation of NFMA.
105. The Project’s violation of visual quality objective standards from the Forest Plan violates NFMA.

SECOND CLAIM FOR RELIEF

The Forest Service violates the Appeals Reform Act regulations by allowing Plaintiffs’ administrative appeals to be decided by an officer subordinate to the officer required by the regulations.

106. All above paragraphs are incorporated by reference.
107. The draft EIS for the Project identifies the “Responsible Official” for the Project as “Mary C. Erickson, Acting Forest Supervisor 1310 Main Street

Billings, MT 59105.” *See* 36 CFR 215.5(a)(listing roles of Responsible Official during draft EIS process). Similarly, prior to the release of the draft EIS, the Forest Service filed a notice in the Federal Register that identified Mary Erickson as the Responsible Official for the Project. 75 Fed Reg 16728–16731 (April 2, 2010).

108. After all public comments were already submitted, the Forest Service identified a different individual as the “Responsible Official” in the final EIS: Walt Allen, District Ranger. The final EIS does not provide any legal authority to support the Forest Service’s attempt to change the Responsible Official from the Forest Supervisor to the District Ranger after the public comment process has ended and all public comments have already been submitted.
109. The ROD for the Project does not explicitly identify which of these two parties is the actual “Responsible Official.” However, the appeal directions in the ROD imply that the Responsible Official is the Forest Supervisor: instead of directing that administrative appeals be sent to the Forest Supervisor, the ROD directs that administrative appeals be sent to the Appeals Deciding Officer at the Forest Service Regional Forester’s office in

Missoula, Montana. The ROD for the Project directs the public to file administrative appeals with the “Appeals Deciding Officer” at the Forest Service Region One office in Missoula, Montana at one of the following addresses: “USDA Forest Service, Northern Region ATTN: Appeal Deciding Officer P.O. Box 7669 Missoula, Montana 59807” or “USDA Forest Service, Northern Region ATTN: Appeal Deciding Officer 200 East Broadway Missoula, Montana 59802” or electronically to “appeals-northern-regional-office@fs.fed.us.”

110. The Appeals Reform Act regulations state that the “Appropriate Appeal Deciding Officer” is the “Regional Forester” if the “Forest Supervisor” is the “responsible official.” The regulations also require that if the “responsible official” is the “District Ranger” then the “Appropriate Appeal Deciding Officer” is the “Forest Supervisor.” 36 C.F.R. § 215.8.
111. The final appeal decision was signed by Tim Bond, who is the Acting *Deputy* Forest Supervisor of the Custer National Forest. The final appeal decision identifies Tim Bond only as the “Appeal Deciding Officer” and does not disclose that he is the Acting *Deputy* Forest Supervisor for the Custer National Forest.

112. Because the Forest Service designated a Deputy Forest Supervisor as the Appeal Deciding Officer, instead of the Regional Forester or even the actual Forest Supervisor, the denial of Plaintiffs' appeals by the Forest Service violates the Appeals Reform Act. The draft EIS represents that the Responsible Official is Mary Erickson, Forest Supervisor, and the ROD directs members of the public to file administrative appeals at the Regional Forester's office in Missoula, Montana. The sleight of hand regarding the final disposition of the administrative appeals of this Project – whereby the final appeal decision was ultimately signed by an individual in a position subordinate to the Forest Supervisor who was identified as the Responsible Official during the public comment process – was not adequately disclosed to the public and does not comply with the law because the regulations require that the Appeals Deciding Officer in this case be the Regional Forester.
113. Even if it were permissible for the Forest Service to change the Responsible Official from the Forest Supervisor to the District Ranger after submission of public comments, and even if it were permissible for the Forest Service to inform the public that the administrative appeals were going to be decided

by the Regional Forester's office even though they were not actually going to be decided there, pursuant to regulation the Appeal Deciding Officer still should have – at least – been the actual Forest Supervisor, not a deputy subordinate to the Forest Supervisor.

THIRD CLAIM FOR RELIEF

The Project violates NEPA because the Forest Service failed to take a hard look at the impacts of the Project and the documents the Project is tiered to.

114. NEPA requires that agencies take a hard look at the environmental implications of their proposed projects.
115. The purpose of NEPA is two-fold: (1) to ensure the agency is adequately informed before making a decision; and (2) to ensure that the public is fully informed of the implications and effects of a proposed project.

A. The Forest Service did not conduct a NEPA analysis for the Custer National Forest Fire Plan.

116. The Project EIS is tiered to the Custer National Forest Fire Management Plan.
117. The Fire Plan sets forth fire management units with specific management requirements.
118. The Fire Plan sets forth a directive and preference to use commercial

logging to attempt to manipulate wildfires, instead of allowing natural fire in an area.

119. The Project implements these requirements and directives from the Fire Plan.
 120. The Forest Service never conducted a NEPA analysis for the Fire Plan.
 121. Courts have repeatedly found that the Forest Service must conduct NEPA analyses for Fire Plans.
 122. The Forest Service's failure to conduct a NEPA analysis for the Fire Plan violates NEPA.
- B. The Forest Service did not take a hard look at the issue of point source discharges in the Project area.
123. The Ninth Circuit Court of Appeals has held that runoff that flows from logging roads into a system of ditches, culverts, or channels and then into forest streams and rivers constitutes a point source under the Clean Water Act and requires a National Pollutant Discharge Elimination System (NPDES) permit. In making this decision, the Ninth Circuit invalidated the "silvicultural exception" to the NPDES permitting system.
 124. The Forest Service refused to acknowledge this legal precedent as binding and refused to conduct an analysis in the EIS on potential point source

discharges in the Project area.

125. The Forest Service refused to consult with the Montana Department of Environmental Quality (MT DEQ) on whether there were potential point source discharges in the Project area and on whether the Forest Service's legal interpretation of the need for an NPDES permit was consistent with the MT DEQ's understanding.
126. The Forest Service made incorrect legal conclusions regarding this issue. In particular, its legal interpretation that the "silvicultural rule" is still in place until the EPA replaces it with a new rule is incorrect. The Ninth Circuit invalidated the "silvicultural rule" and the legal effect is that the last rule previously in effect – before the silvicultural rule – is now in place until a new rule is promulgated.
127. The underlying premise of the memorandum relied upon by the Forest Service to refuse to analyze point source discharges, which is referred to as "email forwarded by Bruce Sims, Regional Hydrologist on 11/17/10," changed prior to the final decision in this case. The memorandum stated that if the Ninth Circuit court denied en banc review of its decision, the Forest Service would need to seek NPDES permits for Forest Service roads.

En banc review was denied approximately one month before the Forest Service signed the final decision authorizing this Project. Nonetheless, the Forest Service still argues that it does not need to seek NPDES permits for the Project.

128. The Forest Service's newest argument, proffered for the first time in the denial of Plaintiffs' administrative appeal, is that the Ninth Circuit decision "involved the State of Oregon." This argument is irrelevant because the rule invalidated by the Ninth Circuit court decision is a federal regulation that applies to all states, including Montana.
129. The Forest Service's various misrepresentations of law regarding this issue, as well as its refusal to analyze and disclose potential point sources in the Project area, violates NEPA. Without an analysis of potential point source discharges, neither the agency nor the public will be adequately informed about this important issue. The Forest Service's failure to take a honest and hard look at this issue violates NEPA.

FOURTH CLAIM FOR RELIEF

[Reserved for Plaintiffs' claim that the Project violates the Endangered Species Act, which will be added when the statutorily required 60 Day Notice period expires]

FIFTH CLAIM FOR RELIEF

[Reserved for Plaintiffs' claim that the Custer Forest Plan violates the Endangered Species Act, which will be added when the statutorily required 60 Day Notice period expires]

SIXTH CLAIM FOR RELIEF

[Reserved for Plaintiffs' claim that the Custer National Forest Fire Management Plan violates the Endangered Species Act, which will be added when the statutorily required 60 Day Notice period expires]

VII. REQUEST FOR RELIEF

For all of the above-stated reasons, Plaintiffs respectfully request that this Court:

- A. Declare that the Project violates the law;
- B. Enjoin implementation of the Project;
- C. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under the EAJA fee provision; and
- D. Grant Plaintiffs any such further relief as may be just, proper, and equitable.

Respectfully submitted this July 8, 2011.

/s/ Rebecca K. Smith
Rebecca K. Smith

Timothy M. Bechtold

Attorney for Plaintiffs