

DANA M. JOHNSON
Northern Rockies Justice Center, PLLC
P.O. Box 9623
Moscow, ID 83843
Tel: (208) 874-3158
Fax: (888) 741-2050
danajohnson@northernrockiesjusticecenter.org
Idaho State Bar # 8359

Attorney for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
CENTRAL DIVISION**

ALLIANCE FOR THE WILD ROCKIES &)
FRIENDS OF THE CLEARWATER,)

Plaintiffs,)

vs.)

RICK BRAZELL, Supervisor of the Nez Perce)
National Forest, FAYE KRUEGER, Regional)
Forester of Region One of the U.S. Forest)
Service, UNITED STATES FOREST)
SERVICE, an agency of the U.S. Department)
of Agriculture, UNITED STATES FISH AND)
WILDLIFE SERVICE, an agency of the U.S.)
Department of Interior.)

Defendants.)

Case No.: 3:12-cv-466

**COMPLAINT FOR DECLATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act and the citizen suit provision of the Endangered Species Act of the U.S. Forest Service’s February 2012 Record of Decision (“ROD”) approving the Little Slate Project (“Project”). Plaintiffs Alliance for the Wild Rockies and Friends of the Clearwater attest that the final decision approving the Project is arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.

2. Among other things, the ROD for the Project authorizes 2,598 acres of logging, 515 acres of prescribed burning, 2,084 acres of excavator piling, 12 miles of road construction, 15 miles of road reconstruction, and road maintenance activities on 63 miles of existing roads.
3. Defendants' approval of the Project violates 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.*, the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*
4. Plaintiffs seek declaratory and injunctive relief to protect Plaintiffs' interests at law, including its interests that the Forest Service comply with NEPA's mandate to consider and disclose environmental impacts, comply with NFMA's mandate to protect biodiversity, and that the Agencies comply with the ESA's mandate to conduct consultation, mitigate harm, and prevent irreparable injury to the environment.
5. Plaintiffs request that the approval of the Project be set aside pursuant to 5 U.S.C. §706(2)(A) and 16 U.S.C. §1540(g), and that the Court enjoin the Forest Service from implementing the Project until Defendants comply fully with NEPA, NFMA, the ESA, and the APA.
6. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs of suit, including attorney and any expert witness fees pursuant to the Equal Access to Justice Act and the ESA, and such other relief as this Court deems just and proper.

JURISDICTION

7. 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.

8. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs' members use and enjoy the Nez Perce National Forest, including the Project area, for hiking, fishing, hunting, camping, photography, and engaging in other vocational, scientific, spiritual, and recreational activities.
9. Plaintiffs' members intend to continue to use and enjoy the Project area frequently and on an ongoing basis in the future. Specifically, Gary Macfarlane, a member and Executive Director of Plaintiff Friends of the Clearwater, has visited the Project area and has plans and a firm intention to visit the Project area in 2013 and on an ongoing basis into the future.
10. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs' members have been and will be adversely affected and irreparably injured if Defendants implement the Project. These are actual and concrete injuries caused by Defendants' failure to comply with mandatory duties under NEPA, NFMA, the ESA, 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, 706, and 16 U.S.C. § 1540(g).
11. Plaintiffs submitted extensive written comments and appeals concerning the Project, have fully participated in the administrative review process, and thus have exhausted administrative remedies as required for the APA claims.
12. Plaintiffs have also filed a 60 day notice of intent to sue under the Endangered Species Act concerning the Project, which has expired, and thus have exhausted statutory requirements as required for the ESA claims.
13. The Forest Service has declared that the Regional Forester's appeal decision for the Project was the final administrative action of the U.S. Department of Agriculture Forest Service.

The Project was effective upon the May 29, 2012 appeal denial by the Deputy Regional Forester, Jane Cottrell, and is therefore final and subject to this Court's review under the APA, 5 U.S.C. §§ 702, 704, and 706, as well as under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g).

VENUE

14. Venue in this case is proper under 28 U.S.C. § 1391(e) and Local Civil Rule 3.1. The Project is located in Idaho County, so venue is proper in the Central Division of the United States District Court for the District of Idaho. Additionally, Defendant Forest Supervisor Brazell signed the ROD approving the Project, and his office is located in Idaho County, also within the Central Division of the United States District Court for the District of Idaho.

PARTIES

15. Plaintiff Alliance for the Wild Rockies ("AWR") is a Montana based tax-exempt, nonprofit 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. AWR has over 2,500 members, including many members who recreate in the Nez Perce National Forest and the Project area. AWR's registered office is located in Helena, Montana. AWR brings this action on its own behalf and on behalf of its adversely affected members.

16. Plaintiff Friends of the Clearwater ("FOC") is a non-profit public interest organization dedicated to the protection and preservation of the native biodiversity of the Clearwater Bioregion. Its registered office is located in Moscow, Idaho. FOC has over 800 members. Members of FOC include biologists, outfitters, recreationists, and researchers who observe, enjoy, and appreciate Idaho's native wildlife, water quality, and quality of terrestrial habitat

as well as the wilderness, roadless, and unroaded character found in the Project area. FOC and its members expect to continue to do so in the future in the Project area. The professional and recreational activities of FOC and its members are directly affected by the Project and Defendants' failure to perform their lawful duty to protect and conserve these ecosystems. FOC brings this action on its own behalf and on behalf of its adversely affected members.

17. Defendant Rick Brazell is the Forest Supervisor for the Nez Perce National Forest. In his capacity as Forest Supervisor, he issued the ROD that authorized the Project, and he is responsible for ensuring that the Project is in compliance with NEPA, NFMA, the ESA, and the APA.
18. Defendant Faye Krueger is Regional Forester for Northern Region One of the U.S. Forest Service, and in that capacity is the official representative of the U.S. Forest Service's Northern Region. She has the 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.
19. Defendant United States Forest Service ("Forest Service") is an administrative agency within the United States Department of Agriculture, entrusted with the management of our National Forests.
20. Defendant United States Fish and Wildlife Service ("USFWS") is an administrative agency within the United States Department of Interior entrusted with administering the ESA with respect to terrestrial wildlife such as Canada lynx and resident fish species such as bull trout.

PROCEDURAL BACKGROUND

21. On or about July 28, 2011, the Forest Service published legal notice of the Little Slate Draft Environmental Impact Statement (“DEIS”).
22. On or about September 06, 2011, Plaintiffs issued timely public comments on the DEIS.
23. On or about March 02, 2012, the Forest Service published legal notice of the Little Slate Final Environmental Impact Statement (“FEIS”) and ROD.
24. On or about April 16, 2012, Plaintiffs filed timely appeals on the decision.
25. On or about May 25, 2012, after reviewing and denying Plaintiffs’ appeal, Deputy Regional Forester Cottrell signed the appeal denial and authorized Project implementation.
26. On or about June 11, 2012, Plaintiffs sent a 60 day notice of intent to sue under the ESA to Defendants.
27. On or about July 26, 2012, Forest Supervisor Brazell responded to Plaintiffs’ 60 day notice of intent to sue concluding that the Project is in full compliance with the ESA.
28. On or about August 01, 2012, Plaintiffs sent a supplemental 60 day notice of intent to sue under the ESA to Defendants offering additional information obtained from a Freedom of Information Act request regarding the Canada lynx violations discussed in the original 60 day notice.
29. On or about August 30, 2012, Forest Supervisor Brazell responded to Plaintiffs’ supplemental 60 day notice of intent to sue concluding that the Project is in full compliance with the ESA and failing to offer any cure for the violations alleged.

FACTUAL ALLEGATIONS

I. Description of the Nez Perce National Forest and the Project area

30. The Little Slate Project will occur in the Salmon River Ranger District of the Nez Perce National Forest. The Project area lies within the Little Slate Creek watershed, a tributary to Slate Creek, and will affect a total of six drainages within the Little Slate watershed as well as the Allison Creek and Kelly Creek watersheds, both of which are tributaries to the Salmon River.
31. Roughly half of the Forest is covered by sections of four congressionally designated wilderness areas, including the Gospel-Hump Wilderness area near the Project area. The Salmon River, also known as “The River of No Return,” forges through a rugged canyon on the Forest. The Salmon River is the longest free-flowing river within one state in the lower 48 states spanning an impressive 425 miles. Project area creeks and streams drain into the Salmon River.
32. The Nez Perce National Forest, known for its wild character, displays a diverse landscape where the rugged canyons of the Salmon River give way to moist cedar forests in the Selway drainage. This landscape was the traditional home of the Ni Mii Puu, or the Nez Perce Indians.
33. The Nez Perce National Forest is also home to a variety of threatened and sensitive wildlife and fish species reliant upon the wild character of this landscape. These species include the grey wolf, the Canada lynx, the Northern Goshawk, the fisher, the wolverine, the pileated woodpecker, bull trout, Chinook salmon, and steelhead.
34. The Nez Perce National Forest and the Clearwater National Forest have completed a proposal to administratively combine the two Forests and are currently in the process of

combining Forest Supervisor offices, Forest websites, and are working jointly on a revised and combined Forest Plan for the two Forests.¹ While the transition is not yet complete, the Forests are utilizing combined letterhead, are in the process of combining websites, and are beginning to function as one administrative unit.

35. The Regional Forester made the decision to combine the two Forests in December of 2010.

II. Description of the Little Slate Project

36. The Little Slate Project will implement 2,598 acres of logging, including 1,211 acres of clearcutting that will retain only 5 to 10% of the canopy, 600 acres of seed tree cutting that will retain only 10-20% of the canopy, 377 acres of shelterwood cutting that will retain only 20-40% of the canopy, and 410 acres of commercial thinning.

37. The Project will also implement prescribed burns on 515 acres and excavator piling on 2,084 acres.

38. The Project will result in 19 openings on the Forest of 40 to 187 acres in size and will require 12 miles of road construction, 15 miles of road reconstruction, and 63 miles of road maintenance activities.

39. The Gospel-Hump Wilderness is located adjacent to the eastern boundary of the Project area.

40. Contributing to the roadless expanse, the Project area contains 6,913 acres (57%) of the 12,200 acre Little Slate Creek Roadless Area and 187 acres (2%) of the 10,300 acre John Day Roadless Area. The Project area also contains unroaded areas that will be subject to logging activities. The Little-Rubie unroaded area is a 3,104 acre tract of land that is contiguous with the Little Slate Creek IRA. The Big Boulder Creek unroaded area is a 6,841 acre tract of land contiguous with the Gospel Hump Wilderness.

¹ The Forests' combined website is available at <http://www.fs.usda.gov/nezperceclearwater>. The Forests' Forest Plan Revision website is available at <http://www.fs.fed.us/cnpz/>.

41. The Project will log 512 acres and construct 2.8 miles of roads in these unroaded areas, including 248 acres of regeneration logging and 19 acres of thinning in the Boulder Creek unroaded area and 160 acres of regeneration logging and 80 acres of thinning in the Little Rubie unroaded area.
42. Regeneration harvest is clearcutting or modified clearcutting.
43. Dispersed clearcut logging and fire suppression in the past have contributed to forest conditions and landscape patterns that differ from those that would have occurred in the absence of such actions. Past regeneration units typically contain few large snags and lower amounts of coarse woody debris than untreated areas.
44. Visual effects from Project activities in unroaded areas and the roadless expanse will be apparent, at a very minimum, until the regeneration and thinning units reestablish, which will likely take many decades.
45. Logging, mining, and fire suppression in the Project area have resulted in previously disturbed areas that lack habitat complexity and structural elements important for wildlife diversity.
46. The Forest Service admits that “[s]nag occurrence is highly variable in the landscape, and densities of desirable snags have been highly reduced in the analysis area due to logging and fire suppression... Many harvest units have been clearcut and dozer piled so that no recruitable snags, green trees, or woody debris exist.”
47. The Forest Service also admits that “[d]ensities of desirable replacement large green trees have been highly reduced in the analysis area due to logging.”
48. The Northern Goshawk is a Management Indicator Species (“MIS”) on the Forest for old growth and old forest dependent species.

49. The Forest Service does not have population trend data for goshawks on the Forest.

50. The Forest Service could not locate any goshawk individuals or nest sites in the Project area.

Thirty goshawk surveys were performed in the Project area, none of which resulted in a goshawk detection.

51. The Forest Service admits that “[n]esting habitat is the most restrictive requirement necessary for goshawk presence.” However, the Forest Service does not appear to have any nesting data for goshawks in the Project area and notes that “the location of any potential nesting sites are currently unknown.”

52. Past logging removed mature and old growth forest habitats that provide the highest quality nesting, post-fledgling, and foraging habitats for this species.

53. Project activities will further destroy 327 acres of modeled nesting habitat, 2,147 acres of modeled foraging habitat, and would further reduce habitat quality by eliminating canopy cover, eliminating canopy layering, and reducing standing snags.

54. The Forest Service admits that “[h]arvesting these preferred habitats would preclude them from being used by goshawks until suitable habitat conditions redevelop, generally over 100 years post harvest.”

55. The Forest Service also does not have population trend data for the two other old-forest and snag dependent MIS, the fisher and the pileated woodpecker.

56. Fishers are considered critically impaired in the state of Idaho.

57. Fisher hair snare surveys in 2007 did not result in any fisher detections. A Forest Service email indicates that Fisher hair snare surveys from 2008 only resulted in one fisher detection. The 2008 survey data was not provided in the response to Plaintiffs’ FOIA request for the Project file.

58. Logging would remove 2,274 acres of modeled fisher habitat.
59. The Forest Service admits that it will take roughly 150 years for stands to regenerate into conditions preferred by fishers after disturbance.
60. Pileated woodpeckers are a Forest MIS for snag dependent species.
61. While the Forest Service notes that “[p]ileated woodpeckers were evident and documented in the project area during project field review,” this documentation was not provided in the Project file.
62. Project logging would remove 891 acres of modeled pileated woodpecker habitat.
63. The Forest Service admits that it will take roughly 150 years for stands to regenerate into conditions preferred by the pileated woodpecker after disturbance.
64. In addition to these MIS species, the black backed woodpecker, a Forest sensitive species and a state of Idaho vulnerable species, is also reliant upon this landscape and is particularly dependent on snag habitat.
65. The Forest Service does not have population trend data for the black backed woodpecker.
66. Regeneration logging would eliminate black backed woodpecker habitat in the short and long term by removing snags used for nesting and foraging. Regeneration logging would also remove mature trees that could later become snags.
67. Commercial thinning would substantially reduce the quality of nesting and foraging habitat by removing snags and replacement snags.
68. Project activities would remove 2,191 acres of black backed woodpecker habitat.
69. The Forest Service notes that the loss of snag habitat would last a minimum of 50 years in this landscape.
70. Firewood gathering activities have further reduced snags in the Project area.

71. Canada lynx, an ESA listed threatened species, was historically present on the Forest.
72. The FWS listed the Canada lynx as a threatened species under the Endangered Species Act in 2000 due to “lack of guidance for conservation of lynx and snowshoe hare habitat ...” and subsequent authorization of actions that may cumulatively adversely affect the lynx. Historically, lynx inhabited states spanning from Maine to Washington, but it is currently unknown how many lynx remain.
73. Lynx are highly mobile and generally move long distances (greater than 60 mi (100 km)); they disperse primarily when snowshoe hare populations decline; subadult lynx disperse even when prey is abundant, presumably to establish new home ranges; and lynx also make exploratory movements outside their home ranges.
74. The Forest Service states in the FEIS that the “Canada lynx is a federally listed threatened species and the US Fish and Wildlife Service has declared the Nez Perce Forest to be unoccupied by lynx; therefore, it will not be discussed further.”
75. The Nez Perce National Forest was listed as “unoccupied” in the 2006 Amendment to the Canada Lynx Conservation Agreement, later adopted by the Northern Rockies Lynx Management Direction (“NRLMD”), because the Forest is “unsurveyed.”
76. The Forest still has not been surveyed with adherence to an acceptable protocol.
77. In response to Plaintiffs’ 60 day notice of intent to sue under the ESA, the Forest Service stated that “the NPNF has conducted winter track surveys for lynx in 2007 and 2009, as well as hair snare surveys in 2008.”
78. However, the 2007 snow track survey was limited to a short period of time in a roaded portion of the Forest, and the surveyors stated that “it is important to recognize that we only

completed a single survey. The survey protocol suggests multiple replicates of the survey in a single winter, or a single set of surveys across multiple years.”

79. Although the Forest Service indicates that a 2009 winter track survey was completed, that survey was not produced in response to Plaintiffs’ Freedom of Information Act request or through any other means by the Forest Service.

80. In response to Plaintiffs’ supplemental 60 day notice of intent to sue under the ESA, the Forest Service stated that the only documentation of the 2009 survey was one email thread from June 25 and 26, 2012 where a fire management officer notes that “[i]t looks like we did surveys in the winter of 07/08 and 08/09. I know we never saw any Lynx activity.” Other than this brief statement, the Forest Service does not appear have any record of the 2009 survey(s).

81. Further, the 2008 hair snare surveyor stated that “we fell far short of complying with the established protocol of installing 25 transects” and that “[t]his type of survey is best conducted with a dedicated crew.”

82. A Canada lynx sighting in the Little Slate area was reported by Forest Service personnel in November of 2010. This sighting was not discussed nor disclosed in the Little Slate Project documents and was only produced through a response to Plaintiffs’ FOIA request.

83. A Canada lynx sighting on the Forest was reported by Forest Service personnel in July of 2006. Likewise, this sighting was not discussed nor disclosed in the Little Slate Project documents.

84. Several other apparently reputable sightings have been documented since the 1980’s on the Forest. These sightings were also not discussed nor disclosed in Project documents.

85. The Clearwater National Forest, a Forest that is being administratively merged with the Nez Perce National Forest, is considered “occupied” by Canada lynx and is subject to management restrictions in the NRLMD. This information was not disclosed in the Little Slate Project documents.
86. In its August 30, 2012 response to Plaintiffs’ supplemental 60 day notice of intent to sue, the Forest Service stated that “[t]he proposed administrative combination of the Nez Perce and Clearwater National Forests has no bearing on the ‘occupied’ or ‘unoccupied’ status of either Forest which continue to be managed as two separate forests, under two separate forest plans.”
87. However, the Forest’s own Forest Plan Revision website states that the revision effort “combines the two previous forest plans into one Nez Perce-Clearwater plan” and refers to the “Nez Perce-Clearwater National Forest” as one forest.²
88. The Nez Perce National Forest also provides linkage habitat for the Canada lynx as “occupied” lynx habitat occurs immediately to the North in the Clearwater National Forest, and the Payette National Forest to the South is managed as occupied through the Payette National Forest’s Forest Plan.
89. The Forest Service did not analyze Project impacts on linkage habitat for the Canada lynx.
90. In addition to effects on terrestrial species and habitat, past logging, mining, road building, and cattle grazing have altered floodplain function and degraded in-stream conditions in the

² The webpage referenced is available at http://www.fs.usda.gov/wps/portal/fsinternet!/ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gjAwhwtDDw9_AI8zPwhQoY6BdkOyoCAPkATIA!/?ss=110117&navtype=BROWSEBYSUBJECT&cid=FSE_003756&navid=1301000000000000&pnavid=1300000000000000&position=BROWSEBYSUBJECT&ttype=main&pname=Nez%20Perce%20National%20Forest-%20Planning. A printed copy of this webpage is attached as Exhibit A.

Little Slate Creek watershed, particularly with regard to fine sediment, spawning and rearing habitat, and water temperature.

91. The Little Slate Creek watershed is identified in the Forest Plan as a watershed not meeting fish and water quality objectives.
92. Slate Creek is a high priority watershed for Chinook salmon, steelhead trout, and bull trout, all ESA listed aquatic species.
93. Biological opinions issued in 1998 by the USFWS and NOAA contain specific direction for priority watersheds, including a sediment Road Management Objective (“RMO”) of 20% or less surface fines in spawning habitat and 30% or less cobble embeddedness in rearing habitat. Most stream reaches in the Little Slate Project area exceed the 30% cobble embeddedness limit.
94. Columbia River bull trout and designated bull trout critical habitat occur in the Project area.
95. Bull trout in the interior Columbia River basin exist in only about 45% of their historical range due in large part to habitat degradation, including poor water quality, and fragmentation resulting from land, water, and forest management decisions.
96. Bull trout have very specific habitat requirements for spawning and rearing and rely on cold streams, complex cover, stable channel conditions, and two-way passage up and downstream. The FWS notes that approximately 1,000 spawning adults within any bull trout population are necessary for maintaining genetic variation.
97. The FWS cites four elements for assessing long-term viability (extinction risk) of bull trout populations: 1) number of local populations, 2) adult abundance (number of spawning fish present in core area in a given year), 3) productivity (reproductive rate of the population), and 4) connectivity (presence of the migratory life history form).

98. Rangewide, bull trout occur in low numbers in many areas, and populations are considered depressed or declining across much of its range.
99. The Project is located within the Little-Lower Salmon River Critical Habitat Subunit and will affect the Columbia River distinct population segment of this species within the Salmon River Management Unit and the Little-Lower Salmon River core area. The survival and recovery of each individual core area within management units is critical to the persistence of management units and to the recovery of the Columbia River population segment.
100. The Little-Lower Salmon River core area is at a high risk of extirpation. The “short-term population trend [is] unknown, numbers of bull trout are low (50-250) and threats to the population are substantial and imminent.”
101. Bull trout habitat in the Project area has been “degraded by past mining, logging, road building, and grazing which have altered floodplain function and instream conditions (fine sediment, spawning/rearing habitat, water temperature).”
102. The Forest Service and the FWS admit that Project activities will cause physiological distress and disturbance from increased levels of suspended sediment and turbidity and will cause adverse effects to bull trout critical habitat.
103. The FWS issued an incidental take statement (“ITS”) for all adult, subadult, and juvenile bull trout downstream 600 feet of in-channel work sites, and all bull trout re-entering the reconstructed reach of Victor Creek during rewatering.
104. It appears that unlimited take of bull trout in these areas is allowed between July 1 and August 15 for the 10 years of Project implementation.
105. Because the FWS notes that “[t]he Assessment provides no information on when each of the sediment producing activities shown in Table 6 will occur,” the FWS allows take at these

work sites, without time restrictions, for the 10 year duration of the Project. Thus, activities listed in Table 6 alone allow block-net related take of 15 bull trout and apparently unlimited take of bull trout within the 6,270 feet of instream work zones.

106. The ITS is limited to take from instream Project activities such as culvert replacement and stream crossing maintenance. Potential take from logging and road building activities is not covered by this ITS.

107. Compounding potential impacts from Project activities, Snake River steelhead and Snake River spring/summer Chinook salmon, both ESA listed threatened species, have designated critical habitat in the Project area. Slate Creek, including all of the Little Slate drainage and its tributaries, is designated critical habitat for the Snake River spring/summer Chinook salmon. Designated critical habitat for Snake River steelhead is located approximately one mile downstream from the Project analysis area.

CLAIMS FOR RELIEF: TERRESTRIAL SPECIES AND HABITAT

FIRST CLAIM FOR RELIEF

The Forest Service and the Fish and Wildlife Service are violating the ESA because the Agencies are failing to ensure the survival and recovery of the threatened Canada lynx.

The Forest Service is violating NEPA by failing to disclose and failing to take a hard look at Project impacts on Canada lynx.

108. All above paragraphs are incorporated by reference.

109. The Agencies have a duty under the ESA to consult on Project impacts to Canada lynx and its habitat, regardless of the “occupied” status of the Forest under the Northern Rockies Lynx Management Direction (“NRLMD”).

110. The purpose of the NRLMD is to “incorporate management direction in land management plans [Forest Plans] that conserves and promotes recovery of Canada lynx.”

The NRLMD states that where conflicts exist between the NRLMD and an existing regulatory mechanism, the more restrictive shall apply.

111. ESA Section 7 requirements are very specific. “A federal agency proposing an action ... must first determine whether the action ‘may affect’ a listed species or critical habitat. ... If the agency determines its proposed action ‘may affect’ a listed species or critical habitat, it must then [engage in consultation].”
112. Determination of “occupied” status under the NRLMD is not a legal requirement for consultation under the ESA. Rather, Agencies must engage in consultation under the ESA if a listed species “may be present,” a low standard that is triggered even if a species may be present “at some point.”
113. If a listed species “may be present,” the Forest Service must prepare a biological assessment. A failure to prepare a biological assessment when a listed species may be present “cannot be considered a *de minimis* violation of the ESA.”
114. There have been several reports of lynx sightings on the Forest since the 1980’s, including a sighting by Forest Service personnel in the Little Slate area as recent as November of 2010. These sightings were not disclosed in Project documents.
115. Based on the historical presence of lynx on the Forest and on ongoing, reputable sightings of lynx on the Forest and in the Project area, the Agencies had information that Canada lynx “may be present” on the Forest and thus had a duty to consult under the ESA.
116. The Agencies failed to consult on Project impacts to the threatened Canada lynx in violation of the ESA.
117. In addition to the Agencies’ failure to consult under the ESA, the Agencies have also failed to survey the Forest for Canada lynx presence.

118. The NRLMD, which incorporated the 2006 Amendment to Canada Lynx Conservation Agreement, lists the Forest as “unoccupied” because it is “unsurveyed.” The NRLMD biological opinion required as a term and condition that “[w]ithin 18 months of the date of the Biological Opinion, the Forest Service shall work with the Service to develop and complete an acceptable protocol to survey currently unoccupied lynx habitat in secondary areas.”
119. The Forest Service has not completed Canada lynx surveys on the Nez Perce National Forest according to the requirements of any acceptable survey protocol.
120. Plaintiff Alliance for the Wild Rockies specifically challenged the Nez Perce National Forest’s management of Canada lynx in *Alliance for the Wild Rockies v. Lyder*, 728 F.Supp.2d 1126, (D. Mont. 2010), and argued that the Recovery Outline acknowledges that some areas may be deemed secondary habitat simply because there are “no recent surveys to document the presence of lynx and/or reproduction.” *Id.* at 1133. The Court agreed that habitat determinations were likely based in large part on “absence of ‘survey effort rather than any biological or ecological principles.’” *Id.* (quoting Plaintiff’s argument).
121. The Forest Service continues to avoid meaningful analysis of management impacts to Canada lynx on the Nez Perce National Forest due to a lack of survey effort in violation of the ESA and continues to fail to disclose and take a hard look at potential impacts to Canada lynx in violation of NEPA.
122. In addition to the above two violations, the Forest Service also failed to disclose that the Nez Perce National Forest is administratively merging with the Clearwater National Forest, a Forest that is considered “occupied” by Canada lynx under the NRLMD. The Regional

Forester made the decision to combine the two Forests in December 2010 and thus was likely aware of the merger much earlier.

123. If a Forest is designated “occupied” for NRLMD purposes, the entire Forest holds this status and remains “occupied” indefinitely. Thus, if the Clearwater National Forest and the Nez Perce National Forest are combined, the entire Nez Perce – Clearwater Forest will be considered “occupied” under the NRLMD and subject to its management restrictions.
124. The Agencies failed to disclose the Forest merger and failed to analyze the resulting management implications for Canada lynx in violation of NEPA and are failing to ensure the Project will not adversely affect or jeopardize the threatened Canada lynx in violation of the ESA.
125. The Forest Service has failed to take a hard look at and disclose Little Slate Project impacts on lynx habitat, including linkage areas, in violation of NEPA. The Forest Service and the FWS did not analyze Project impacts to the threatened Canada lynx in the Project environmental analysis or biological opinion. This failure to ensure that the Project will not adversely affect the survival and recovery of the imperiled Canada lynx and/or cause unpermitted take of this species is in violation of the ESA and represents yet another management failure in a long line of management failures to protect this species.

SECOND CLAIM FOR RELIEF

The Forest Service is violating NFMA and NEPA by failing to ensure the viability of old-growth dependent and snag dependent species.

126. All above paragraphs are incorporated by reference.
127. The Forest Plan requires the Forest Service to manage old growth habitat to maintain viable populations of old growth dependent species and requires the Forest Service to monitor population levels of Management Indicator Species (“MIS”).

128. The Northern goshawk, the fisher, and the pileated woodpecker were selected as MIS for old growth and old forest dependent species on the Nez Perce National Forest, with the pileated woodpecker also representing snag dependent species.
129. The Forest Service does not have population trend data for these MIS species and is relying upon habitat modeling as a proxy-on-proxy approach for ensuring old growth and old forest dependent species viability.
130. The 9th Circuit has held that where “the Forest Service predicts healthy populations of MIS based on habitat estimations, but there is no population trend data for the MIS and the evidence shows that the MIS no longer inhabit the area, the estimations do not mirror reality and reliance on proxy-on-proxy is arbitrary and illegal.”
131. Here, the Forest Service does not have population trend information for the goshawk on the Forest, and goshawks appear to be virtually nonexistent in the Project area. Formal goshawk surveys failed to locate any individuals, and the Forest Service does not have nesting data for this species.
132. The Forest Service admits that “past timber harvest removed mature and old growth forest habitats that provide the highest quality nesting, post-fledgling areas, and foraging habitats for this species.” Project activities will further destroy 327 acres of modeled nesting habitat, 2,147 acres of modeled foraging habitat, and would further reduce habitat quality by eliminating canopy cover, eliminating canopy layering, and reducing standing snags. The Forest Service admits that “[h]arvesting these preferred habitats would preclude them from being used by goshawks until suitable habitat conditions redevelop, generally over 100 years post harvest.”

133. Even though the Forest Service does not know population trends for the goshawk, does not have any information regarding important nest sites, was unable to find any goshawks in the Project area, and even though it admits that Project activities will destroy roughly 2,500 acres of goshawk habitat in an already degraded landscape and that this damage will not be capable of repair for at least 100 years, the Forest Service claims that the Project will have “[n]o measurable effects to goshawk populations at the local or regional scale.”
134. Likewise, the Forest Service does not have population trend information for the fisher on the Forest, and fishers appear to be virtually nonexistent in the Project area. Formal fisher hair snare surveys failed to detect any fishers in 2007 and only detected one individual fisher outside of the Project area in 2008.
135. Even though the Forest Service does not have population trend information for the fisher on the Forest, was able to locate only one fisher through formal surveys in the vicinity of the Project area, and even though it admits that Project activities will destroy 2,274 acres of modeled fisher habitat and that this damage will not be capable of repair for at least 150 years, the Forest Service concluded that impacts to this species would be “small to negligible.”
136. The Forest Service does not have population trend information for the pileated woodpecker on the Forest, and the Forest Service has failed to provide detection data for the pileated woodpecker in the Project area.
137. The Forest Service arbitrarily concluded that “[n]o measurable effects to [pileated woodpecker] populations at the local or regional scale, or alteration of current population trend, are expected.

138. The Forest Service's reliance upon a proxy on proxy analysis that does not mirror reality and its subsequent determinations that the Project will have no measurable effect on the MIS goshawk, fisher, and pileated woodpecker are in violation of NFMA. The Forest Service's failure to take a hard look at Project impacts on these MIS species is in violation of NEPA.
139. The Forest Service is failing to protect sensitive species habitat, including black backed woodpecker habitat, and disclose Project impacts on this habitat in violation of NFMA and NEPA.

THIRD CLAIM FOR RELIEF

The Forest Service is violating NEPA by failing to disclose and take a hard look at Project impacts on roadless characteristics and wilderness potential.

140. All above paragraphs are incorporated by reference.
141. The National Forest Management Act requires that "all roadless, undeveloped areas shall be evaluated for wilderness designation during forest plan revision."
142. The Forest Service notes that "[a] roadless area is specifically defined as an area that meets the minimum criteria for wilderness. Unroaded lands typically share similar characteristics and are often smaller. Unroaded areas contiguous or adjacent to Roadless areas will be analyzed the same as designated Roadless areas."
143. The 9th Circuit has held that logging in roadless areas is environmentally significant because there are certain roadless attributes such as water resources, soils, wildlife habitat, and recreation opportunities that possess independent environmental significance that must be analyzed and because of the potential for designation as wilderness areas under the Wilderness Act of 1964.

144. The 9th Circuit has also held that “the decision to harvest timber on a previously undeveloped tract of land is ‘an irreversible and irretrievable decision’ which could have ‘serious environmental consequences.’”
145. The Gospel-Hump Wilderness is located adjacent to the eastern boundary of the Project area.
146. The Project area contains 6,913 acres (57%) of the 12,200 acre Little Slate Creek Roadless Area and 187 acres (2%) of the 10,300 acre John Day Roadless Area.
147. The Project area also contains unroaded areas that will be subject to logging activities. The Little-Rubie unroaded area is a 3,104 acre tract of land that is contiguous with the Little Slate Creek IRA. The Big Boulder Creek unroaded area is a 6,841 acre tract of land contiguous with the Gospel Hump Wilderness.
148. The Project will log 512 acres and construct 2.8 miles of roads in this roadless expanse, including 248 acres of regeneration logging and 19 acres of thinning in the Boulder Creek unroaded area and 160 acres of regeneration logging and 80 acres of thinning in the Little Rubie unroaded area.
149. The Forest Service claims that these “vegetation treatments would have no long term effects as trees would grow back” and “[t]he 3.2 miles of proposed temporary roads in both unroaded areas would be decommissioned after harvest; therefore, their effect would be temporary.”
150. The Forest Service’s determination that regeneration logging and road building will have only short term impacts on roadless characteristics and thus will not impact roadless characteristics and wilderness potential runs counter to case law, the Forest Service’s own management guidance on the issue, and past experience.

151. Forest Service guidance states that “harvest areas may be included as roadless if the logging and prior road construction are not evident.”
152. Thus, the standard for analysis under Forest Service guidance is whether or not the logging and road construction will leave marks on the landscape that are “evident.”
153. During comments and appeals on the Project, the Forest Service was confronted with information by Plaintiffs that prior projects with lesser effects were removed from roadless consideration due to “evident” marks on the landscape.
154. The Forest Service did not address this concern, did not accurately analyze and disclose Project impacts on roadless consideration and wilderness attributes, and did not take a hard look at Project impacts in violation of NEPA.

CLAIMS FOR RELIEF: AQUATIC SPECIES AND HABITAT

FOURTH CLAIM FOR RELIEF

The Forest Service and the Fish and Wildlife Service are violating the ESA and NEPA because the Agencies failed to adequately discuss and analyze the direct, indirect, and cumulative impacts of logging and road building on bull trout and its habitat and did not use the best available science in making its determinations. The Agencies are failing to ensure the survival and recovery of the threatened bull trout.

155. All above paragraphs are incorporated by reference.
156. Section 7 of the ESA imposes a duty on agencies to consult with either the Fish and Wildlife Service or the NOAA Fisheries Service before engaging in discretionary actions that may affect a listed species or its critical habitat.
157. “The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid the action’s unfavorable impacts.”

158. Regulations implementing these sections of the Act define "jeopardize the continued existence of" as "engag[ing] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species," and "destruction or adverse modification" is defined as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical."
159. The no jeopardy and no adverse modification determinations for the threatened bull trout are arbitrary, capricious, and illegal under the ESA and NEPA because the Agencies failed to adequately discuss and analyze the direct, indirect, and cumulative impacts of logging, road building, and other management activities on bull trout and its habitat and did not use the best available science in making its determinations.
160. Slate Creek is a high priority watershed for bull trout. Biological Opinions issued in 1998 by the USFWS and NOAA contain specific direction for priority watersheds, including a sediment RMO of 20% or less surface fines in spawning habitat and 30% or less cobble embeddedness in rearing habitat. Most stream reaches in the Little Slate Project area exceed the 30% cobble embeddedness limit.
161. The Forest Service asserts that short term adverse impacts and further degradation of habitat will have only insignificant effects on the local bull trout population and thus pose no jeopardy to this species and no adverse modification to its critical habitat. The Forest Service draws much attention to long-term modeled improvements in habitat quality but bases this

projection on limited and stale data. Further, the Agencies do not discuss the short-term impact threshold that this highly imperiled population can withstand.

162. Because of these shortcomings, the Agencies are failing to ensure the survival and recovery of the threatened bull trout in violation of the ESA and are failing to take a hard look at Project impacts in violation of NEPA.

a. The Agencies failed to adequately analyze direct, indirect, and cumulative effects in violation of the ESA and NEPA.

163. All of the affected bull trout streams in the Project area have elevated levels of cobble embeddedness and are currently not meeting Forest Plan standards. Project activities will further increase levels of suspended sediment / turbidity and deposited sediment in these streams.

164. The effects on these streams from multiple years of logging do not appear to be expressly analyzed in the biological assessment and/or biological opinion; rather, the effects analysis is focused heavily on culvert replacements and channel reconstruction. However, the Project will implement more logging and road building in these already degraded watersheds.

165. The Forest Service offers no direct discussion or credible, scientific assessment of Project impacts from logging and burning on 2,598 acres of forest, including 1,211 acres of clearcutting, 600 acres of seed tree cutting, and 377 acres of shelterwood cuts. There is no direct discussion or credible, scientific assessment of impacts from the 410 acres of commercial thinning or impacts from logging that will create 19 forest openings of 40 -187 acres in size. There is no direct discussion or credible, scientific assessment of impacts from haul routes. However, data tables in the appendices of the FEIS indicate that “vegetative treatments” are expected to have detrimental effects on sediment yield, water yield, and cobble embeddedness without any long-term beneficial effects.

166. The Forest Service minimizes impacts from Project logging and road building activities by shifting the discussion to long-term modeled benefits from restoration and decommissioning activities.
167. There is likewise no discussion regarding the impact threshold for this highly imperiled population of bull trout. The Little-Lower Salmon River core area is at a high risk of extirpation. The “short-term population trend [is] unknown, numbers of bull trout are low (50-250) and threats to the population are substantial and imminent.”
168. The FWS cites four elements for assessing long-term viability (extinction risk) of bull trout populations: 1) number of local populations, 2) adult abundance (number of spawning fish present in core area in a given year), 3) productivity (reproductive rate of the population), and 4) connectivity (presence of the migratory life history form). These specific elements were not analyzed.
169. The failure to take a hard look at direct and indirect impacts from Project logging and road building is in violation of NEPA, and the Agencies’ determinations regarding bull trout and its critical habitat are arbitrary, capricious, and in violation of the ESA.
- b. The Agencies failed to use the best available science in violation of the ESA and NEPA.**
170. The ESA requires the use of the best available science. 16 U.S.C. 1536(a)(2). The APA requires agencies to base their decisions on substantial supporting evidence in the record. 5 U.S.C. §706 (2)(E).
171. The Forest Service has very limited information on the status of the bull trout population in the Project area, and the limited information that the Forest Service relies upon in making its habitat determinations is stale and/or unreliable.

172. All of the affected bull trout streams in the Project area have elevated levels of cobble embeddedness and are currently not meeting Forest Plan standards.
173. The Forest Service relies upon limited information from the 1990s in its analysis and argues that this information has been updated with habitat quality data from 2007. The very limited information provided for 2007 is either irrelevant or the basis for the information has not been provided.
174. The Forest Service has failed to provide a credible, scientific set of time series data that would statistically document a trend in habitat degradation or improvement. No rational context has been provided for the 2007 data point.
175. The latest monitoring report for the Nez Perce National Forest, dated 2004, notes that “results of the monitoring are not available.” This language is identical to language used in the 2000 and 1999 reports, and the 1998 and 1997 reports fail to offer any data on habitat capacity monitoring in Project area drainages.
176. Further, the Forest Service does not appear to know population trends of the Little-Lower Salmon River core area bull trout population, but Project documents do note that this population is at a high risk of extirpation, the “short-term population trend [is] unknown, numbers of bull trout are low (50-250) and threats to the population are substantial and imminent.”
177. The Forest Service has failed to take a hard look at Project effects on the ESA listed bull trout in violation of NEPA, has failed to use the best available science in violation of the ESA, and has failed to base its determination on substantial supporting evidence in the record in violation of the APA.

FIFTH CLAIM FOR RELIEF

The Forest Service is violating NFMA and NEPA because the Forest Service is allowing logging in drainages that do not show a positive, upward trend in habitat capacity as required by the Forest Plan and because the Forest Service has failed to take a hard look at Project effects on aquatic habitat.

178. All above paragraphs are incorporated by reference.
179. The provisions of a forest plan are legally enforceable under NFMA.
180. The Nez Perce Forest Plan provides overall management direction for the Nez Perce National Forest. The Little Slate project tiers to the Nez Perce National Forest Land and Resource Management Plan FEIS and ROD. The Forest Plan states that “[t]imber management activities can occur in [drainages not meeting Forest Plan objectives], concurrent with habitat improvement efforts, as long as habitat capacity shows a positive, upward trend.”
181. Past logging, road building, and other land management activities have degraded watershed streams in the Project area to “below objective conditions.” The predominant factor for this degradation is chronic sedimentation, which influences cobble embeddedness and percent fines.
182. Because Project area drainages do not meet Forest Plan objectives, habitat capacity in these drainages must show a positive, upward trend before logging activities can occur.
183. The Forest Service has demonstrated a significant lack of monitoring of area streams. However, the limited monitoring data collected in the 1990s and 2007 does show that *every* prescription watershed within the Project area is below Forest Plan objectives.
184. The Forest Service is relying upon limited and/or irrelevant data from 2007 to show that habitat capacity is showing a positive upward trend.

185. The Forest Service is also relying upon modeled projections of long-term habitat improvements from restoration activities. Forecasting beneficial effects, especially when ongoing and cumulative impacts from road building and logging activities do not appear to be sufficiently factored into this forecast, is not sufficient.
186. The Forest Service does not have population data on imperiled fish species listed under the ESA, it relies on stale water quality data from the 1990s in analyzing watershed health, and it admits that logging and road building have degraded watersheds below Forest Plan standards in the Little Slate area.
187. It also fails to show any current indication that habitat capacity in this degraded landscape is demonstrating a positive, upward trend. Without any current indication of improvement, the authorization of more logging and road building based upon long-term modeled and speculative improvement is meaningless, particularly when the Forest Service has demonstrated that it is not likely to monitor the watershed post-Project before authorizing further degradation based upon further speculation.
188. Because the Forest Service has not demonstrated a positive, upward trend in habitat capacity as required by the Forest Plan, the Forest Service's authorization of further logging and road building is in violation of NFMA. The failure to take a hard look at Project activities is in violation of NEPA.

SIXTH CLAIM FOR RELIEF

The Forest Service is violating NEPA because it failed to disclose the potential need for NPDES permits under the Clean Water Act, it failed to consult with the proper regulatory agency regarding the need for NPDES permits, and it illegally asserted that it is not bound by 9th Circuit precedent regarding NPDES permits for logging road point source pollution.

189. All above paragraphs are incorporated by reference.

190. The Forest Service is violating NEPA by failing to disclose and misrepresenting the potential need for and compliance with National Pollutant Discharge Elimination System (“NPDES”) permits as required by the Clean Water Act for point source pollution.
191. NEPA's purpose is twofold: (1) to ensure that agencies carefully consider every significant aspect of the environmental impact of a proposed action and (2) to guarantee relevant information is available to the public.
192. NEPA is not designed to allow agencies to postpone analysis to the last possible moment. “Rather, it is designed to require such analysis as soon as it can reasonably be done.”
193. The Ninth Circuit has held that “stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which [a NPDES permit] is required.” *NEDC v. Brown*, 640 F.3d 1063 (9th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3143 (U.S. June 25, 2012) (No. 11-347).
194. The Forest Service admits that the road system used for the Project includes drainage features such as ditches and culverts, some with discernible connections to streams.
195. However, the Forest Service claims that “[t]he Forest Service was not a party in [the *Brown*] lawsuit and is not currently bound by [the 9th Circuit] decision.”
196. NEPA regulations require that the agency “[r]equest the comments of ... [a]ppropriate State and local agencies which are authorized to develop and enforce environmental standards.”
197. Rather than requesting comments concerning potential NPDES permits during Project development and NEPA analysis, the Forest Service states that “the responsible official would obtain NPDES permits if they are required at the time of project implementation.”

198. The Forest Service is asking the public to take it at its word that it will do the right thing rather than disclosing that NPDES permits may be needed, disclosing consultation with the appropriate state agency regarding the need for NPDES permits, and explaining how the Project will comply with any needed NPDES permits. The Forest Service is evading public scrutiny and involvement in violation of NEPA.

REQUESTS FOR RELIEF

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

- A. Declare that the Agencies have violated the law;
- B. Enjoin the implementation of the Project;
- C. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under the EAJA and/or the ESA; and
- D. Grant Plaintiff such further relief as may be just, proper, and equitable.

Respectfully submitted this 11 day of September, 2012.

/s/ Dana M. Johnson

DANA M. JOHNSON
Northern Rockies Justice Center, PLLC
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2012, I electronically filed the foregoing COMPLAINT with the Clerk of the Court via the CM/ECF system, which will provide service on all counsel of record.

As no defendant has yet filed an appearance on the case, I hereby certify that on September 12, 2012, I sent identical copies of the foregoing document and document attachment to the following (all defendants) via certified mail:

Eric Holder, Jr., Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

Civil Process Clerk
U.S. Attorney's Office
800 Park Blvd, Suite 600
Boise, ID 83712

Rick Brazell, Forest Supervisor
Nez Perce National Forest
104 Airport Road
Grangeville, ID 83530

Faye Krueger, Regional Forester
U.S. Forest Service, Northern Region
P.O. Box 7669
Missoula, MT 59807

Tom Tidwell, Chief
U.S. Forest Service
P.O. Box 96090
Washington, DC 20090-6090

Dan Ashe / Rowan Gould, Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

/s/ Dana M. Johnson
Dana M. Johnson
Attorney for Plaintiffs