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

ALLIANCE FOR THE WILD
ROCKIES &
NATIVE ECOSYSTEMS COUNCIL,

Plaintiffs,

vs.

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,

Defendants.

Case No.:

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

INTRODUCTION

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1. This is a civil action for judicial review under the Administrative Procedure Act of the U.S. Forest Service’s March 9, 2012 Decision Memo (“DM”) approving the Little Belt Mountain Hazard Tree Removal Project (“Project”). Plaintiffs Alliance for the Wild Rockies and Native Ecosystems Council 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. The DM for the Project authorizes over 17,000 acres of logging on National Forest Lands, including logging in Inventoried Roadless Areas, Wilderness Study Areas, Research Natural Areas, and old growth forest. The Forest Service authorized these activities under a National Environmental Policy Act Categorical Exclusion and thus did not prepare an Environmental Assessment or Environmental Impact Statement for the Project.
3. Defendants’ approval of the Project violates the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4331 *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 Plaintiffs’ interests that the Forest Service comply with NEPA’s mandate to fully consider and disclose environmental impacts.

- 1 5. Plaintiffs request that the approval of the Project be set aside pursuant to 5
2 U.S.C. §706(2)(A) and that the Court enjoin the Forest Service from
3 implementing the Project until Defendants comply fully with NEPA and the
4 APA.
5
6 6. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs of
7 suit, including attorney and any expert witness fees pursuant to the Equal
8 Access to Justice Act, and such other relief as this Court deems just and proper.
9

10 **JURISDICTION**
11

- 12 7. This action arises under the laws of the United States and involves the United
13 States as a defendant. Therefore, this Court has subject matter jurisdiction over
14 the claims specified in this Complaint pursuant to 28 U.S.C. §§ 1331, 1346.
15
16 8. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs'
17 members use and enjoy the Lewis and Clark National Forest, including the
18 Project area, for hiking, fishing, hunting, camping, photography, and engaging
19 in other vocational, scientific, spiritual, and recreational activities.
20
21 9. Plaintiffs' members intend to continue to use and enjoy the Project area
22 frequently and on an ongoing basis in the future. Specifically, Sara Johnson, a
23 member and Executive Director of Plaintiff NEC, has visited the Project area
24 and has plans and a firm intention to visit the Project area in 2013 and on an
25 ongoing basis into the future.
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1 10. The aesthetic, recreational, scientific, spiritual, and educational interests of
2 Plaintiffs' members have been and will be adversely affected and irreparably
3 injured if Defendants implement the Project. These are actual and concrete
4 injuries caused by Defendants' failure to comply with mandatory duties under
5 NEPA and the APA. The requested relief would redress these injuries and this
6 Court has the authority to grant Plaintiffs' requested relief under 28 U.S.C. §§
7 2201, 2202, and 5 U.S.C. §§ 705, 706.
8

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10
11 11. Plaintiffs submitted extensive written comments and appeals concerning the
12 Project, have fully participated in the administrative review process, and thus
13 have exhausted administrative remedies as required for the APA claims.
14

15 12. The Project was effective upon the June 13, 2012 appeal denial by Deputy
16 Regional Forester, Jane Cottrell, and is therefore final and subject to this
17 Court's review under the APA, 5 U.S.C. §§ 702, 704, and 706.
18

19 **VENUE**

20
21 13. Venue in this case is proper under 28 U.S.C. § 1391(e) and LR 3.2. Defendant
22 Krueger, the chief representative for U.S. Forest Service Region One, has her
23 office within the Missoula Division of the United States District Court for the
24 District of Montana. Additionally, Deputy Regional Forester Cottrell signed the
25 appeal denials affirming the Project, and her office is also located within the
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1 Missoula Division of the United States District Court for the District of
2 Montana.

3
4 **PARTIES**

5 14. Plaintiff Alliance for the Wild Rockies (“AWR”) is a Montana based tax-
6 exempt, nonprofit organization dedicated to the protection and preservation of
7 the native biodiversity of the Northern Rockies Bioregion, its native plant, fish,
8 and animal life, and its naturally functioning ecosystems. AWR has over 2,500
9 members, including members who reside on private land close to the Lewis and
10 Clark National Forest, and many members who recreate in the Project area.
11
12 AWR’s registered office is located in Helena, Montana. AWR brings this
13
14 action on its own behalf and on behalf of its adversely affected members.
15

16 15. Plaintiff Native Ecosystems Council (“NEC”) is a non-profit Montana
17 corporation with its principal place of business in Three Forks, Montana. NEC
18 is dedicated to the conservation of natural resources on public lands in the
19 Northern Rockies. Its members use and will continue to use the Lewis and
20 Clark National Forest for work and outdoor recreation of all kinds, including
21 fishing, hunting, hiking, horseback riding, wildlife viewing, and cross-country
22 skiing. The Forest Service’s unlawful actions adversely affect NEC’s
23
24 organizational interests, as well as its members’ use and enjoyment of the Lewis
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1 and Clark National Forest, in the Project area. NEC brings this action on its
2 own behalf and on behalf of its adversely affected members.

3
4 16. Defendant Faye Krueger is the Regional Forester for the Northern Region of the
5 U.S. Forest Service, and in that capacity is the official representative of the U.S.
6 Forest Service's Northern Region. She has the ultimate responsibility for
7 ensuring that decisions made at the National Forest (unit) level in the Northern
8 Region are consistent with applicable laws, regulations, and official policies
9 and procedures.
10

11
12 17. Defendant United States Forest Service ("Forest Service") is an administrative
13 agency within the United States Department of Agriculture, entrusted with the
14 management of our National Forests.
15

16 **PROCEDURAL BACKGROUND**

17
18 18. On or about October 28, 2011, the Forest Service posted legal notice of the
19 Project proposal and began the 30-day comment period on the scoping proposal
20 for the Project.
21

22 19. On or about November 21, 2011 and November 25, 2011, Plaintiffs issued
23 timely public comments on the Project scoping proposal.
24

25 20. On or about March 9, 2012, Forest Supervisor Avey signed the DM authorizing
26 the Project.
27

28 21. On or about April 30, 2012, Plaintiffs filed timely appeals on the decision.

1 22. On or about June 13, 2012, after reviewing and denying Plaintiffs' appeals,
2 Deputy Regional Forester Cottrell signed the appeal denial authorizing Project
3 implementation.
4

5 **FACTUAL ALLEGATIONS**

6 23. The Project, authorized under NEPA categorical exclusions listed in 36 C.F.R.
7 220.6(d)(3,4,5), is located within the Lewis and Clark National Forest.
8

9 24. This Forest is characterized by vast coniferous forests, woody valley bottoms,
10 high mountain peaks and broad grassy meadows. The Bob Marshall and
11 Scapegoat wilderness areas cover nearly half of the Forest land.
12

13 25. The Forest provides habitat for a range of unique and sensitive wildlife species
14 including wolverines, the gray wolf, flammulated owls, moose, elk, marten,
15 black-backed woodpeckers, and goshawks. It also provides habitat for species
16 listed under the Endangered Species Act including the grizzly bear and the
17 Canada lynx.
18
19

20 26. The Forest Service has authorized tree removal, including commercial logging,
21 around 58 recreation special use sites (recreation residences), 157 recreation
22 sites (campgrounds and campground trails), 5 non-recreational special use sites
23 (repeater towers), and along 575 miles of roads. The total impacted acreage of
24 this project is over 17,000 acres.
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1 27. “Hazard trees” up to 2 tree-lengths from recreation and administrative sites will
2 be cut.

3 28. “Hazard trees” up to 1.5 tree-lengths from Forest roads, routes to recreation
4 residences, and routes to campgrounds, including trails/footpaths, will be cut.
5

6 29. A “hazard tree” is broadly defined in an appendix to the DM as any tree
7 meeting any one of twelve factors listed in the Project document “Parameters in
8 Identifying Hazard Trees,” or any tree that doesn’t fully satisfy any one of the
9 twelve factors but is showing signs of any two or more of the factors.
10

11 30. In other Project documents, a hazard tree is defined “as any tree that may fail
12 due to a structural defect and, as a result, may cause property damage or
13 personal injury.”
14

15 31. Snags will also be removed in these areas.
16

17 32. Logging units will vary in overall size, width, shape, and distance from the road
18 center line.
19

20 33. The Project includes 1,238 acres of logging within Inventoried Roadless Areas
21 (“IRA”) as well as logging along roughly 7 miles of road in the Middle Fork
22 Judith Wilderness Study Area (“WSA”) and along roughly 2 miles of road in
23 two Research Natural Areas (“RNA”).
24

25 34. Trees logged within the IRAs may be cut and sold.
26

27 35. Trees within the Middle Fork Judith WSA will be cut and left on site.
28

1 36. The Forest Service asserts that cutting and leaving the trees on site within the
2 WSA will “in part mimick[] [sic] what the tree will do within 15 years on their
3 [sic] own.” It further asserts that trees falling on their own would compromise
4 solitude and primitive recreation “even without this project” and that the “short-
5 term impact” on apparent naturalness due to stumps and slash would diminish
6 within 5 years as “vegetation in this area would cover the landscape as young
7 trees and shrubs cover the stumps.”
8
9

10 37. The Forest Service asserts that “the felling of hazard trees [within the WSA]
11 would not be substantive and would recover in about 5 years.”
12

13 38. The Forest Service further asserts that Project logging will not impact
14 wilderness character in the WSA because the presence of a road outside of the
15 WSA boundary already compromises the natural integrity of the WSA, and the
16 “decision would not impact the interior of the Middle Fork Judith WSA so that
17 integrity would remain intact.”
18
19

20 39. In addition to logging within the boundary of this WSA, the Project authorizes
21 the removal of old growth trees.
22

23 40. The Forest Service states that “[m]ountain pine beetle preferentially infests and
24 kills older, larger diameter trees ... [and] [w]ith the current mountain pine
25 beetle epidemic, live pine trees meeting the Green and others (1992) criteria for
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1 old growth are highly susceptible to mortality which would subsequently make
2 them a hazard to public safety along roads and within recreation sites.”

3
4 41. These live old growth trees would be cut.

5 42. In addition to discretionary logging of old growth “hazard trees,” 62 acres of
6 old growth logging is planned in one timber compartment not currently meeting
7 Forest Plan old growth standards.
8

9 43. The Forest Service did not disclose old growth stand survey data for the Project
10 area.
11

12 44. ESA listed, ESA candidate, Forest Service sensitive, and Forest Service
13 indicator species inhabit the Project area and/or have habitat that would be
14 affected by Project activities. The wolverine, Canada lynx, black-backed
15 woodpecker, Northern goshawk, Westslope cutthroat trout, Western toad, and
16 Northern three-toed woodpecker all are known to occur in the Project area
17 and/or have habitat in the Project area.
18
19

20 45. The Forest Service claims that Canada lynx are not known to occur within the
21 analysis area but have habitat within the analysis area.
22

23 46. The Project area is currently considered “unoccupied,” secondary lynx habitat
24 under the Northern Rockies Lynx Management Direction.
25

26 47. The Canada lynx, an ESA listed threatened species, has historical presence on
27 the Forest including verified historical sightings in the Project area.
28

1 48. Verified Canada lynx tracks have been documented in the Project area between
2 1981 and 1997.

3 49. Project activities will occur in 19 Lynx Analysis Units covering 12,928 acres.
4

5 50. Project activities would log 2,356 acres of mapped lynx denning habitat and
6 7,571 acres of mapped foraging habitat.
7

8 51. A biological assessment was not completed for this species.

9 52. The wolverine is a “candidate” (warranted but precluded) species for listing
10 under the ESA, and is one of the rarest and least understood animals in the
11 United States.
12

13 53. The wolverine is a Forest Service sensitive species and management indicator
14 species that is known to occur in the Project area.
15

16 54. The US Fish and Wildlife Service (FWS) notes that it is reasonable to estimate
17 that the wolverine population in the contiguous United States is roughly 250 to
18 300 individuals, and a recent study found that just 35 individuals are breeding
19 successfully in the western United States.
20

21 55. The Forest Service states that Project logging will remove 12 acres of modeled
22 denning habitat for the wolverine out of a total of 1,514 modeled denning
23 habitat acres across the Little Belt Mountains.
24

25 56. Disturbance to wolverines due to Project activities is possible, particularly
26 during winter logging operations.
27
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1 57. The Forest Service asserts that this disturbance is not expected to impact
2 wolverine population numbers, but population data and trends were not
3 provided for the analysis area or the Forest.
4

5 58. They gray wolf has habitat and is known to occur within the Project area.

6 59. The gray wolf is a Forest Service sensitive species.
7

8 60. The Forest Service admits that gray wolf reports have increased in the Little
9 Belt Mountains in recent years.

10 61. Because the Forest Service claims that Project activities will not increase
11 livestock conflicts and will not impact large ungulates, a prey species for the
12 gray wolf, it did not analyze Project impacts to the gray wolf.
13
14

15 62. The goshawk is a Management Indicator Species for old growth dependent
16 species, including sensitive species, on the Forest and is known to occur in the
17 Project area. The goshawk is also a State of Montana species of concern.
18

19 63. The Forest Service states that Brewer et al. recommends at least a 40 acre no-
20 activity buffer zone around nest sites.
21

22 64. Project logging would impact at least five known active goshawk nesting areas
23 within the 40 acre no-activity buffer zone.
24

25 65. The Project will increase the acres of Forest openings by 4,387 acres, or from
26 16% to 17%. Acres of openings on the Forest already exceed what is
27
28

1 recommended by Reynolds et al. (1992) and are above the range found in the
2 Northwestern United States.

3
4 66. The Forest Service states that within the 5 known active nesting areas, “the
5 acres of openings increases from between 62 acres and 319 acres,” and “[i]n
6 the Mass Geis Territory this results in a 9% increase in area of openings.”

7
8 67. The Forest Service admits that the analysis area is “well below” Reynolds et al.
9 recommended levels for trees greater than 10” diameter at breast height
10 (“DBH”) and that Project activities would further remove 4,466.5 acres of this
11 tree size class.
12

13
14 68. The Forest Service admits that logging that does not retain larger size classes of
15 trees in goshawk nesting habitat can have a negative impact on goshawk
16 productivity. The Forest Service also admits that the proposed action will
17 reduce the largest size classes of trees on 4,466.5 acres, 3,944.2 acres of which
18 are modeled goshawk nesting habitat and 1,307.6 acres of which are old growth
19 habitat.
20

21
22 69. Project activities are expected to cause goshawk nesting and foraging
23 disturbance resulting in displacement away from the disturbance.
24

25
26 70. Sensitive species dependent upon old growth and snag habitat also have habitat
27 in the Project area.
28

1 71. The black-backed woodpecker, a snag dependent species, is a Forest Service
2 sensitive species known to occur in the Project area.

3 72. The recommended snag level for the black-backed woodpecker is between 135
4 and 158 snags per 100 acres with a 10 inch dbh minimum. In riparian areas, the
5 recommended snag level is 300 snags per acre with a 6 inch dbh minimum.
6

7 73. A total of 17,801 acres of habitat for the black-backed woodpecker will be
8 logged.
9

10 74. The Forest Service does not disclose snag data for the Project area or state
11 whether recommended snag levels for the black-backed woodpecker will be
12 met after Project implementation.
13

14 75. The Forest Service does not disclose population data for the black-backed
15 woodpecker.
16

17 76. In addition to effects to terrestrial species and habitat, the Project will also
18 impact aquatic species and habitat.
19

20 77. Over 80 acres of Project logging will occur in stream management zones for
21 impaired streams, including Belt Creek, Dry Fork Belt Creek, and the South
22 Fork Judith River, which are all impaired due to sediment.
23

24 78. Sediment is expected to be “the main water quality impact to fish and aquatic
25 wildlife from this Project.”
26
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1 79. Approximately 1,700 acres of logging will occur within 150 feet of streams,
2 including cutting in 13% of one sub-watershed and along 64% of the Jefferson
3 Creek stream area.
4

5 80. The Jefferson Creek watershed contains westlope cutthroat trout, and a majority
6 of the logging will occur on the westslope cutthroat trout bearing portion of this
7 creek.
8

9 81. Westslope cutthroat trout is a Forest Service sensitive species.

10 82. In most streams on the Little Belt Mountain Range, this species is either
11 extirpated, hybridized with rainbow trout, or at a competitive disadvantage to
12 differing assemblages of eastern brook trout, brown trout, and rainbow trout.
13
14

15 83. Westslope cutthroat trout with a genetic purity of 90% or higher are found in
16 only about 5% of their historic habitat on the Forest. The species, at 90%
17 genetic purity and above, is known to occur within 50 streams within the
18 Project analysis area.
19

20 84. The westslope cutthroat trout has several genetically unique and isolated
21 populations within the Project area.
22

23 85. Roughly 205 acres of logging and herbicide spraying will occur within stream
24 management zones of 23 westslope populated streams.
25

26 86. Fine sediment can reduce trout spawning success by preventing eggs from
27 receiving adequate levels of dissolved oxygen.
28

1 87. The Forest Service acknowledges that “[h]igh sediment production events are
2 especially a concern when a population of a rare or sensitive species is located
3 in an isolated habitat unit. These isolated populations can no longer migrate to
4 another stream to complete their lifecycle while maintaining genetic purity.
5 This makes these fish especially vulnerable to chronically elevated levels of
6 sediment or catastrophic sediment events such as debris flows.”
7
8

9 88. Cumulative impacts to Jefferson Creek “could combine with hazard tree
10 removal to [] impact a population [of westslope] at a tangible or measurable
11 level.”
12

13 89. The Forest service also notes that “[t]he proposed activities have the potential to
14 influence stream temperatures by removing stream-side trees. The shade
15 provided by dead, defoliated conifers is substantially less than that provided by
16 the living canopy, but these trees still provide shade to adjacent streams.”
17
18

19 90. Westslope cutthroat trout is the most sensitive fish species in the Project area to
20 elevated temperatures.
21

22 91. Eastern brook trout, a non-native competitor of westslope cutthroat trout, is
23 more tolerant of sedimentation and elevated stream temperatures. Thus,
24 sedimentation and elevated stream temperatures affect westslope cutthroat trout
25 through increased competition with brook trout as well.
26
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1 92. In addition to elevated sediment and water temperature, logging along Jefferson
2 Creek, Harley Creek, and Logging Creek “would change inputs of large woody
3 debris to levels which could be considered ‘significant.’”
4

5 93. Streams in the Project area that are adjacent to roads and recreation sites are
6 already well below historical levels of in-stream large woody debris.
7

8 94. There has been a steady decline in large woody debris levels in Project area
9 streams for more than a century due in large part to past logging and firewood
10 removal.
11

12 95. Large woody debris has consistently been shown to increase stream carrying
13 capacity for fish, mussel, and amphibian populations.
14

15 96. Forest mortality episodes (including beetle outbreaks) occur in natural temporal
16 patterns and can greatly increase coarse woody debris recruitment to streams,
17 and aquatic habitat quality can be reduced for many decades if these natural
18 pulses of recruitment are artificially limited.
19

20 97. Riparian areas in the Project area will have limited recruitment opportunities for
21 several decades after the current forest mortality episode passes.
22

23 98. The loss of large diameter trees are of great concern because these trees have
24 the ability to form pools, an important habitat feature for many aquatic species,
25 and to persist until the next recruitment event occurs.
26
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1 99. Impacts to Jefferson Creek may “produce carrying capacity effects that could
2 extend very far beyond the treatment areas.”

3 100. The Forest Service admits that “habitat degradations [for westslope cutthroat
4 trout] could persist beyond one or two years unless large investments are made
5 to improve and/or relocate road segments and campsites.”
6

7 101. The Forest Service asserts that implementation of Best Management
8 Practices (“BMP”) will reduce impacts to watersheds and aquatic habitat, and
9 that the Project would meet state stream water quality standards for sediment “if
10 regulated best management practices and forest plan standards and guidelines
11 are properly implemented.”
12
13
14

15 102. However, the Forest Service notes that “the existing road system ha[s]
16 frequent departures from BMP conditions. A large amount of work would be
17 required to bring some of the proposed haul routes up to BMP standards. Forest
18 Road 227 along Jefferson Creek would be very difficult and expensive to bring
19 up to BMP hauling route standards.”
20
21

22 103. Also reliant upon aquatic habitat in the Project area, the western toad is a
23 Forest Service sensitive species with occupied breeding habitat across the
24 Project area.
25

26 104. The Forest Service anticipates some direct take of western toads through
27 increases in haul and access traffic as well as weed spraying activities.
28

1 105. Project activities would require ongoing herbicide application to prevent and
2 control weed outbreaks.

3 106. Disturbed soils around activity areas “could become colonized with weeds
4 that could be quickly and widely spread.” Following Project activities, “[t]he
5 probability of weeds moving into riparian areas without herbicide treatment ...
6 is very high” and “[t]he 150 foot width of the roadside treatments is beyond the
7 application range of roadway operated spraying equipment.”

8 107. Toads are active within the Project area and could move into herbicide
9 sprayed areas shortly after application. Rain events after herbicide application
10 would increase risks to aquatic communities, including toads.

11 108. The Forest Service’s conclusion that the Project is suitable for a categorical
12 exclusion, and thus would not require the preparation of an EA or EIS, is based
13 in part upon the assumed effectiveness of 87 mitigation measures.

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19 **CLAIM FOR RELIEF**

20 **The Forest Service violated NEPA by illegally authorizing a 17,000 acre**
21 **logging project under a categorical exclusion.**

22
23 109. All above paragraphs are incorporated by reference.

24 110. NEPA is a procedural statute that does not “mandate particular results, but
25 simply provides the necessary process to ensure that federal agencies take a
26 hard look at the environmental consequences of their actions.”
27
28

1 111. The Council on Environmental Quality (“CEQ”) NEPA regulations
2 authorize an agency to use a categorical exclusion for a “category of actions
3 which do not individually or cumulatively have a significant impact on the
4 human environment and which have been found to have no such effect in
5 procedures adopted by a Federal agency in implementation of those
6 regulations.””
7
8

9 112. A proposed action may be categorically excluded from further analysis and
10 documentation in an environmental impact statement (“EIS”) or an
11 environmental analysis (“EA”) only if there are no extraordinary circumstances
12 related to the proposed action that may be impacted by Project activities and if
13 1) the proposed action is within one of the categories established by the
14 Secretary at 7 CFR part 1b.3, or 2) the proposed action is within a category
15 listed in 36 C.F.R. §220.6(d) and (e).
16
17
18

19 113. In this case, the Forest Service has violated NEPA by authorizing a 17,000
20 acre logging project under a categorical exclusion because the Project is far
21 outside of the scope of categories contemplated by the regulations and because
22 there are several extraordinary circumstances that would render the application
23 of a categorical exclusion to this Project inappropriate.
24
25

26 **a. A categorical exclusion is not appropriate in this case because the Project**
27 **is well outside of the scope of categories listed and contemplated in 36**
28 **C.F.R. § 220.6(d).**

Scale

1
2
3 114. An impacts analysis is of critical importance in situations such as this
4 because the Project is large in scale and has the potential to impact a large
5 number of acres across a variety of sensitive resource conditions.

6
7 115. A project of this scale was not contemplated in the NEPA categorical
8 exclusion regulations and is thus inappropriate.

9
10 116. In this case, the Forest Service did not prepare an EA or an EIS for the
11 roughly 17,000 acre logging Project; rather, it asserted that the Project would
12 fall under one of the categorical exclusions for repair and maintenance activities
13 listed under 36 C.F.R. §220.6(d)(3,4,5).
14

15 117. Logging over 17,000 acres of land is of a far different scope than the
16 examples of actions allowable under the categorical exclusions cited for this
17 Project: e.g., mowing lawns, replacing roofs, painting buildings, resurfacing
18 roads, pruning vegetation, etc. *See* 36 C.F.R. §220.6(d)(3,4,5).
19
20

21 118. The Project activities at issue in this case are more akin to the “hazardous
22 fuel reduction activities” categorical exclusion that was deemed illegal by the
23 federal courts. *Sierra Club v Bosworth*, 510 F.3d 1016 (9th Cir. 2007). Even
24 that categorical exclusion did not allow tree removal if the acreage exceeded
25 1,000 acres, an acreage limit that this Project clearly exceeds.
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Extensive application of herbicides

1
2 119. In addition to the above concerns regarding the scale of the Project, the
3 Forest Service will be implementing ongoing herbicide treatment to control the
4 spread of weeds after Project activity disturbance.

5
6 120. None of the examples detailed in 36 CFR §220.6(d)(3,4,5) include the
7 application of herbicides along roads. In fact, subsection 4 of the regulations
8 explicitly excludes repair and maintenance activities along roads, trails, and
9 landline boundaries if the activity is paired with the application of herbicides.
10

11
12 121. While subsection 5 does include the example of applying herbicides and
13 insecticides to control poison ivy and insects at recreation sites, this subsection
14 does not include application along roads and the limited application of herbicide
15 described around recreation sites is very different from the scale of application
16 proposed in this Project.
17

18
19 122. Here, herbicide application will be needed on an ongoing basis along 575
20 miles of roads and over 17,000 acres of land.
21

22 123. The ongoing use of herbicide over such a large area of land is not
23 categorically excluded from consideration in an EA and the authorization of
24 such an application is a violation of NEPA.
25

26 **b. Even if the court finds that a Categorical Exclusion was not precluded in**
27 **this case by the scale of the Project or by the application of herbicides,**
28 **extraordinary circumstances render its application inappropriate.**

1
2 124. The Forest Service handbook includes a list of resource conditions that
3 should be considered in determining whether extraordinary circumstances
4 related to a proposed action warrant further analysis and documentation in an
5 EA or an EIS. FSH 1909.15 § 31.2. These conditions include: 1) federally
6 listed threatened or endangered species or designated critical habitat, species or
7 habitat proposed for federal listing or designation, or Forest Service sensitive
8 species, 2) flood plain, wetlands, or municipal watersheds, 3) congressionally
9 designated areas, such as wilderness, wilderness study areas, or national
10 recreation areas, 4) inventoried roadless areas or potential wilderness areas, 5)
11 research natural areas, 6) American Indian and Alaska Native sites, and 7)
12 archaeological sites, or historic properties or areas.
13
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17 125. If any of the above conditions are present, the Forest Service must analyze
18 whether there is a cause-effect relationship between the action and the potential
19 effect to the resource conditions, and if such a relationship exists, the degree of
20 potential effects on those conditions. If the degree of potential effect raises
21 uncertainty over its significance, the use of a categorical exclusion is improper
22 and an EA or an EIS is required.
23
24
25

26 126. Most of the conditions are present in this case, there is a cause-effect
27 relationship between Project actions and potential effects to the conditions, and
28 the degree of potential effect raises uncertainty over its significance.

1) *Federally listed threatened or endangered species or designated critical habitat, species or habitat proposed for federal listing or designation, or Forest Service sensitive species*

127. ESA listed and proposed (i.e. candidate) species as well as Forest Service sensitive and indicator species inhabit the Project area and/or have habitat that would be affected by Project activities. The wolverine, Canada lynx, northern goshawk, black-backed woodpecker, gray wolf, westlope cutthroat trout, and western toad all are known to occur and/or have habitat in the Project area and would be affected by Project activities.

128. The ESA listed Canada lynx has been historically detected in the Project area and has habitat that would be affected by Project activities.

129. Project activities would log 2,356 acres of mapped lynx denning habitat and 7,571 acres of mapped foraging habitat.

130. Several sensitive and management indicator terrestrial species have habitat within the Project area, including the wolverine, the gray wolf, the northern goshawk, and the black-backed woodpecker.

131. Disturbance to wolverines due to Project activities is possible, particularly during winter logging operations, and Project activities will remove wolverine denning habitat. The wolverine is a Forest Service sensitive species that is proposed and warranted for ESA listing.

1 132. The gray wolf is a Forest Service sensitive species known to occur in the
2 Project area. Gray wolf reports have increased in recent years across the Little
3 Belt mountains, but the Forest Service declined to analyze Project impacts to
4 this species arguing that livestock conflicts and impacts to large ungulates will
5 not increase.
6

7
8 133. The goshawk is a management indicator species for old growth dependent
9 species on the Forest, is a State of Montana species of concern, and is known to
10 occur in the Project area.
11

12 134. Project logging would impact at least five known active goshawk nesting
13 areas within the 40 acre no-activity buffer zone and will increase the acres of
14 Forest openings by 4,387 acres.
15

16 135. The Forest Service notes that within the 5 known active nesting areas, “the
17 acres of openings increase[] from between 62 acres and 319 acres,” and “[i]n
18 the Mass Geis Territory this results in a 9% increase in area of openings.”
19

20 136. The Forest Service admits that the analysis area is “well below” Reynolds et
21 al. recommended levels for trees greater than 10” DBH and that Project
22 activities would further remove 4,466.5 acres of this tree size class.
23

24 137. The Forest Service admits that logging that does not retain larger size classes
25 of trees in goshawk nesting habitat can have a negative impact on goshawk
26 productivity. The Forest Service also admits that the proposed action will
27
28

1 reduce the largest size classes of trees on 4,466.5 acres, 3,944.2 acres of which
2 are modeled goshawk nesting habitat and 1,307.6 acres of which are old growth
3 habitat.
4

5 138. Project activities are expected to cause goshawk nesting and foraging
6 disturbance resulting in displacement away from the disturbance.
7

8 139. The black-backed woodpecker, a snag dependent species, is a Forest Service
9 sensitive species known to occur in the Project area.
10

11 140. A total of 17,801 acres of habitat for the black-backed woodpecker will be
12 logged.
13

14 141. In conclusion, Project activities will result in habitat removal and/or
15 degradation for a number of ESA-listed, ESA-proposed, and Forest Service
16 sensitive species, as well as displacement of individuals from important habitat.
17 The impact on so many species and their habitat over so many acres at least
18 raises uncertainty regarding the potential significance of the impact such that
19 the Forest Service should have prepared an EA or an EIS to ensure that the
20 public and decision-makers are fully informed of the potential impact.
21

22 *2) Flood plain, wetlands, or municipal watersheds*
23

24 142. Project activities will also impact sensitive aquatic habitat and species.
25

26 143. Project logging will occur in several already degraded watersheds and along
27 several streams that are considered impaired due to sediment. These areas
28

1 provide habitat for the westslope cutthroat trout and the western toad, both
2 Forest Service sensitive species that will be impacted by Project activities.

3
4 144. The Forest Service anticipates direct and indirect mortality to western toads
5 from increased usage of haul routes and from the spraying of herbicides to
6 prevent weed infestations.

7
8 145. Approximately 1,700 acres of logging will occur within 150 feet of streams,
9 including cutting in 13% of one sub-watershed and 64% along Jefferson Creek.

10
11 146. The Jefferson Creek watershed contains westslope cutthroat trout, and a
12 majority of the logging will occur on the westslope cutthroat trout bearing
13 portion of this creek.

14
15 147. The westslope cutthroat trout has several genetically unique and isolated
16 populations within the Project area.

17
18 148. Roughly 205 acres of logging and herbicide spraying will occur within
19 stream management zones of 23 westslope populated streams, and
20 sedimentation is expected to be the primary impact to area streams from Project
21 activities.

22
23 149. The Forest Service acknowledges that “[h]igh sediment production events
24 are especially a concern when a population of a rare or sensitive species is
25 located in an isolated habitat unit. These isolated populations can no longer
26 migrate to another stream to complete their lifecycle while maintaining genetic
27
28

1 purity. This makes these fish especially vulnerable to chronically elevated
2 levels of sediment or catastrophic sediment events such as debris flows.”

3
4 150. Cumulative impacts to Jefferson Creek “could combine with hazard tree
5 removal to [] impact a population [of westslope] at a tangible or measurable
6 level,” and logging along Jefferson Creek, Harley Creek, and Logging Creek
7 “would change inputs of large woody debris to levels which could be
8 considered ‘significant.’”
9

10
11 151. The loss of large diameter trees are of great concern because these trees have
12 the ability to form pools, an important habitat feature for many aquatic species,
13 and to persist until the next recruitment event occurs.
14

15 152. Impacts to Jefferson Creek may “produce carrying capacity effects that
16 could extend very far beyond the treatment areas,” and the Forest Service notes
17 that “habitat degradations [for westslope cutthroat trout] could persist beyond
18 one or two years unless large investments are made to improve and/or relocate
19 road segments and campsites.”
20
21

22 153. The Forest Service’s conclusion that likely effects from the Project do not
23 warrant the preparation of an EA or EIS relies upon the assumed effectiveness
24 of many BMPs, many of which the Forest Service admits will be difficult
25 and/or expensive to implement.
26
27
28

1 154. Project activities will be the source of impact to these resource conditions,
2 and uncertainty over the degree of potential impact warrants the preparation of
3 an EA or an EIS.
4

5 3) *Congressionally designated areas, such as Wilderness, Wilderness Study*
6 *Areas, or National Recreation Areas and 4) Inventoried Roadless Areas or*
7 *potential Wilderness areas*

8 155. The National Forest Management Act requires that “all roadless,
9 undeveloped areas shall be evaluated for wilderness designation during forest
10 plan revision.” 36 C.F.R. § 219.9 (b)(8).
11

12 156. While the Forest Service does not believe that chipping away at roadless and
13 WSA boundaries is environmentally significant, this conclusion runs contrary
14 to established case law and the Forest Service’s own management guidance.
15

16 157. The 9th Circuit has held that logging in roadless areas is environmentally
17 significant because there are certain roadless attributes such as water resources,
18 soils, wildlife habitat, and recreation opportunities that possess independent
19 environmental significance that must be analyzed and because of the potential
20 for designation as wilderness areas under the Wilderness Act of 1964.
21

22 158. The 9th Circuit has also stated that “the decision to harvest timber on a
23 previously undeveloped tract of land is ‘an irreversible and irretrievable
24 decision’ which could have ‘serious environmental consequences.’”
25
26
27
28

1 159. Forest Service guidance states that “harvest areas may be included as
2 roadless if [] logging and prior road construction are not evident.”

3
4 160. Project logging will impact the Middle Fork Judith WSA.

5 161. “Hazard trees” within the WSA, along roughly 7 miles of road, will be
6 logged.

7
8 162. “A hazard tree is defined as any tree that may fail due to a structural defect
9 and, as a result, may cause property damage or personal injury.”

10
11 163. The Forest Service asserts that “[t]his project would not impact the interior
12 of the JWSA and are [sic] only felling trees that will fell by themselves in about
13 15 years.”

14
15 164. The Forest Service asserts that while stumps and slash would impact
16 apparent naturalness, in about 5 years “the vegetation in this area would cover
17 the landscape as young trees and shrubs cover the stumps.”

18
19 165. The Forest Service further asserts that “apparent naturalness has already
20 been compromised by the existence of a road; the felling of hazard trees would
21 not be substantive and would recover in about 5 years.”

22
23 166. Project logging will also impact Inventoried Roadless Areas and contiguous
24 Unroaded areas.

25
26 167. The Project will implement 1,238 acres of logging in 9 separate IRAs.
27
28

1 168. The Forest Service asserts that while “[t]he removal of hazardous trees
2 would initially create stumps and slash ... which would initially appear
3 unnatural,” in 5 years “these areas would re-vegetate, as young trees and shrubs
4 fill the landscape.”
5

6 169. The Forest Service further asserts that while “[t]he cutting, sale, or removal
7 of hazard trees would allow for greater sight distance from Forest roads into the
8 IRA” and would “allow traffic noise to carry further than if the hazard trees
9 remained standing,” both effects that would impact solitude, “the dead trees are
10 not anticipated to remain standing long-term (greater than 15 years), as they
11 will fall in the future.”
12
13
14

15 170. However, this statement ignores the value of standing dead trees, especially
16 to sensitive species dependent on dead trees, during those 15 years. Further,
17 Project activities are not restricted to the cutting of dead trees. Rather, from the
18 various definitions applied in Project documents, both dead and live trees
19 demonstrating a range of actual and potential structural defects may be logged.
20
21

22 171. Finally, the Forest Service argues that Project logging will not affect
23 primitive or unconfined recreation because these experiences are generally had
24 within the interior of the IRA, not on the boundary of the IRA.
25

26 172. The Forest Service concludes that the cutting and removal of trees within
27 IRAs and near contiguous unroaded areas will occur, but argues “the presence
28

1 of the roads has a greater impact on wilderness attributes or roadless
2 characteristics of these IRAs.” Thus, the agency argues that “cutting and
3 removal would not substantially impact wilderness attributes or roadless
4 characteristics.”
5

6 173. The Forest Service’s conclusion is in violation of NEPA. Logging in
7 roadless and unroaded areas is an irretrievable commitment of resources, the
8 environmental impact of which is significant. Stumps and slash piles leave
9 marks upon the landscape that will be evident for decades. At the very least,
10 logging and herbicide spraying in a Wilderness Study Area and multiple
11 Inventoried Roadless Areas raises uncertainty over the significance of the
12 action, and thus the application of a categorical exclusion was illegal, and the
13 agency must at least analyze the Project with an EA.
14
15
16

17
18 *5) Research Natural Areas*

19 174. Project logging will impact RNAs.

20
21 175. Trees will be logged along 2 miles of roads in the Onion Park RNA, the O-
22 Brien Creek RNA, and the Tenderfoot Experimental Forest.

23
24 176. The Forest Service Manual (4063.3(2)) states that logging is not permitted
25 within RNAs, and FSM 4063.32 requires management activities within RNAs
26 to be jointly approved by the Forest Supervisor and the Station Director.
27
28

1 177. The Rocky Mountain Research Station Liaison and the Scientist-in-Charge
2 of the Tenderfoot Experimental Forest, after reviewing the Project proposal,
3 recommended specific mitigation measures, including more narrowly defining
4 the definition of a hazard tree and more narrowly restricting the size of logging
5 zones, for any tree removal within the RNAs.
6

7
8 178. The liaison and scientist-in-charge explained that the “[h]azard tree
9 definition within these road stretches should only include dead trees and any
10 live trees with lean greater than 20% in the direction of the road (i.e., if they
11 fell, they would hit the road), and NOT any living trees with other defects (such
12 as dead, broken, or forked tops; evidence of decay, cracks, root disease, insect
13 attack, or lean other than defined above).” They explained that “[i]n most
14 cases, trees may live for long periods of time with many of these defects before
15 actually dying and naturally falling over and potentially creating a safety hazard
16 on the road.”
17
18
19

20 179. The liaison and scientist-in-charge also emphasized that the “[t]reatment
21 area shall be no more than 1 average tree length from the road edge.”
22

23 180. The Forest Supervisor dismissed these concerns and recommendations by
24 stating, “I read the suggestions and had concern with (1) Hazard Tree definition
25 and (4) Treatment area shall be no more than 1 average tree length from the
26 road side.” The Forest Supervisor continued, “I believe your concerns can be
27
28

1 addressed without strictly following the suggestions in your letter but rather
2 making a case by case decision for hazards out on the ground.” The Forest
3 Supervisor also noted that “[a] management plan ... will be written and sent for
4 approval before any treatment will take place.”

5
6 181. Accordingly, because the Forest Supervisor refused to implement the
7 conditions provided by the Station Director, the logging activities proposed for
8 the RNA were not jointly approved as required.

9
10 182. The referenced management plan was not included in Project File
11 documents.

12
13 183. Project activities will impact this resource condition and the degree of
14 impact raises uncertainty over its significance, especially since the Forest
15 Supervisor refused to implement the required conditions from the RNA Station
16 Director, which is a legal requirement. This activity must be analyzed, at least,
17 in an EA.
18
19

20 **CONCLUSION**

21
22 184. Because this 17,000 acre logging and herbicide spraying Project is well
23 outside of the scope of activities to which categorical exclusions should apply
24 and/or outside the categories listed and contemplated in 36 C.F.R. § 220.6(d),
25 the Forest Service illegally authorized the Project under categorical exclusions
26 in violation of NEPA.
27
28

1 185. Further, because many of the “extraordinary circumstance” resource
2 conditions that preclude the application of a categorical exclusion are present in
3 this case, because Project activities will impact these resource conditions, and
4 because the degrees and numbers of potential effects raise uncertainty over the
5 significance of the individual and cumulative effects of this Project, the Forest
6 Service illegally authorized the Project under categorical exclusions in violation
7 of NEPA.
8
9

10 **REQUEST FOR RELIEF**
11

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

- 13 A. Declare that the Forest Service has violated the law;
14
15 B. Enjoin the implementation of the Project;
16
17 C. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable
18 attorney fees under the EAJA; and
19
20 A. Grant Plaintiffs such further relief as may be just, proper, and equitable.

21 Respectfully submitted this 14th Day of September, 2012.

22 /s/ Rebecca K. Smith

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28