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13 Attorneys for Plaintiffs

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

17 NATIVE ECOSYSTEMS COUNCIL,
18 ALLIANCE FOR THE WILD
19 ROCKIES

20 Plaintiffs,

21 vs.

22 VICKI CHRISTIANSEN, Interim
23 Regional Forester of Region One of the
24 U.S. Forest Service, UNITED STATES
25 FOREST SERVICE, an agency of the
26 U.S. Department of Agriculture, and
27 U.S. FISH AND WILDLIFE
28 SERVICE, an agency of the U.S.
Department of Interior,

Defendants.

CV-

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

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I. INTRODUCTION

- 1. This is a civil action for judicial review under the citizen suit provision of the Endangered Species Act of the U.S. Forest Service’s Decision Notice and Finding of No Significant Impact (DN) authorizing implementation of the Fleecer Project (Project) on the Beaverhead-Deerlodge National Forest (Forest), and the Record of Decision (and corresponding biological assessment and biological opinion) authorizing implementation of the revised Beaverhead-Deerlodge National Forest Land and Resource Management Plan (Revised Forest Plan). This is also a civil action for judicial review of the Project and Revised Forest Plan under the Administrative Procedure Act.
- 2. Plaintiffs Alliance for the Wild Rockies and Native Ecosystems Council attest that the decisions approving the Project and Revised Forest Plan are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.
- 3. Defendants’ approval of the Project and Forest Plan and corresponding documents as written is a violation of the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*, the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, 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 request that the Court set aside or remand the Project decision pursuant to 5 U.S.C. § 706(2)(A) and 16 U.S.C. § 1540(g), and that the Court enjoin the U.S. Forest Service from implementing the Project.
- 5. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs and expenses of suit, including attorney and expert witness fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and the Endangered Species Act, 16 U.S.C. § 1540(g)(4), and such other relief as this Court deems just and proper.

II. JURISDICTION

- 6. This action arises under the laws of the United States and involves the United States as a Defendant. Therefore, this Court has subject matter

1 jurisdiction over the claims specified in this Complaint pursuant to 28
2 U.S.C. §§ 1331, 1346.

- 3 7. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs'
4 members use and enjoy the Beaverhead-Deerlodge National Forest for
5 hiking, fishing, hunting, camping, photographing scenery and wildlife, and
6 engaging in other vocational, scientific, spiritual, and recreational activities.
7 Plaintiffs' members intend to continue to use and enjoy the area frequently
8 and on an ongoing basis in the future.
- 9 8. The aesthetic, recreational, scientific, spiritual, and educational interests of
10 Plaintiffs' members have been and will be adversely affected and
11 irreparably injured if Defendants implement the Projects. These are actual,
12 concrete injuries caused by Defendants' failure to comply with mandatory
13 duties under NFMA, NEPA, ESA, and the APA. The requested relief would
14 redress these injuries and this Court has the authority to grant Plaintiffs'
15 requested relief under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 &
16 706.
- 17 9. Plaintiffs submitted timely written comments concerning the Project and
18 fully participated in the available administrative review and appeal
19 processes, thus they have exhausted administrative remedies. Defendants'
20 denials of Plaintiffs' administrative appeals were the final administrative
21 actions of the U.S. Department of Agriculture Forest Service. Thus, the
22 challenged decision is final and subject to this Court's review under the
23 APA, 5 U.S.C. §§ 702, 704, and 706.

24 **III. VENUE**

- 25 10. Venue in this case is proper under 28 U.S.C. § 1391(e) and LR 3.3(a)(1).
26 Defendant Christiansen, the chief representative for U.S. Forest Service
27 Region One, resides within the Missoula Division of the United States
28 District Court for the District of Montana.

IV. PARTIES

11. Plaintiff ALLIANCE FOR THE WILD ROCKIES is a tax-exempt, non-
profit public interest organization dedicated to the protection and
preservation of the native biodiversity of the Northern Rockies Bioregion,

1 its native plant, fish, and animal life, and its naturally functioning
2 ecosystems. Its registered office is located in Helena, Montana. The
3 Alliance has over 2,000 individual members, many of whom are located in
4 Montana. Members of the Alliance work as fishing guides, outfitters, and
5 researchers, who observe, enjoy, and appreciate Montana's native wildlife,
6 water quality, and terrestrial habitat quality, and expect to continue to do so
7 in the future, including in the Project area in the Beaverhead-Deerlodge
8 National Forest. Alliance's members' professional and recreational
9 activities are directly affected by Defendants' failure to perform their lawful
10 duty to protect and conserve these ecosystems by approving the challenged
11 Project. Alliance for the Wild Rockies brings this action on its own behalf
12 and on behalf of its adversely affected members.

10 12. Plaintiff NATIVE ECOSYSTEMS COUNCIL is a non-profit Montana
11 corporation with its principal place of business in Three Forks, Montana.
12 Native Ecosystems Council is dedicated to the conservation of natural
13 resources on public lands in the Northern Rockies. Its members use and
14 will continue to use the Beaverhead-Deerlodge National Forest for work
15 and for outdoor recreation of all kinds, including fishing, hunting, hiking,
16 horseback riding, and cross-country skiing. The Forest Service's unlawful
17 actions adversely affect Native Ecosystems Council's organizational
18 interests, as well as its members' use and enjoyment of the Beaverhead-
19 Deerlodge National Forest, including the Project area. Native Ecosystems
20 Council brings this action on its own behalf and on behalf of its adversely
21 affected members.

19 13. Defendant VICKI CHRISTIANSEN is the Interim Regional Forester for the
20 Northern Region/Region One of the U.S. Forest Service, and in that
21 capacity is charged with ultimate responsibility for ensuring that decisions
22 made at each National Forest in the Northern Region, including the
23 Beaverhead-Deerlodge National Forest, are consistent with applicable laws,
24 regulations, and official policies and procedures. In addition, the Regional
25 Forester signed the Record of Decision for the Revised Forest Plan and
26 denied Plaintiffs' administrative appeals of the Project.

25 14. Defendant UNITED STATES FOREST SERVICE (Forest Service) is an
26 administrative agency within the U.S. Department of Agriculture, and is
27 responsible for the lawful management of our National Forests, including
28 the Beaverhead-Deerlodge National Forest.

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2 15. Defendant UNITED STATE FISH AND WILDLIFE SERVICE is an
3 administrative agency within the U.S. Department of Interior and is
4 responsible for lawful management of species listed under the Endangered
Species Act.

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6 **V. PROCEDURAL BACKGROUND**

- 7 16. On January 14, 2009, Defendant Christiansen's office signed the Record of
8 Decision authorizing implementation of the Revised Forest Plan.
- 9 17. On Oct. 30, 2009, the Washington D.C. office of the Forest Service denied
10 Plaintiffs' administrative appeals of the Revised Forest Plan.
- 11 18. On September 30, 2011, the Forest Service signed a Decision
12 Notice/Finding of No Significant Impact authorizing implementation of the
13 Project under the Revised Forest Plan. The Project area encompasses
14 102,424 acres and includes clearcut logging of 1,137 acres of "dead and
15 dying" lodgepole pine affected by the mountain pine beetle, commercial
16 logging (commercial "thinning") of 480 acres of Douglas-fir stands,
17 thinning 620 acres of Douglas-fir in grass-shrub parks, removing conifers
18 in 117 acres of riparian-associated aspen stands, and within 25 acres of
upland clones, precommercial thinning 689 acres of sapling-sized trees in
19 old harvest units, replacing four undersized and misaligned culverts, and
installing two fish barriers to secure habitat for westslope cutthroat trout.
20 The Project also includes 4.99 miles of new "temporary" road construction,
as well as the reopening, reconstruction, and use of formerly closed roads.
- 21 19. On November 7, 2011, Plaintiffs filed a notice of intent to sue over the
22 Project and Revised Forest Plan for violation of the Endangered Species
Act.
- 23 20. On December 28, 2011, Defendant Christiansen's office dismissed the
24 administrative appeals filed by Plaintiffs over the Project, constituting the
25 final action of the U.S. Department of Agriculture.
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VI. FACTUAL ALLEGATIONS

Existing Conditions

21. The Forest covers 3.38 million acres in Beaverhead, Butte-Silver Bow, Deer Lodge, Granite, Jefferson, Madison, Powell, and Gallatin counties in southwestern Montana.
22. The Forest straddles the mountains of the Continental Divide and contains nationally renowned trout streams, elk populations, and some of last wild refuges for many threatened, endangered, and sensitive fish and wildlife species.
23. In particular, the Forest and Project area provide habitat for grizzly bears, wolverines, Canada lynx, gray wolves, and westslope cutthroat trout.
24. Ruggiero et al (1999), the Forest Service's General Technical Report "Ecology and Conservation of Lynx in the United States," states that lynx are present in the Forest.
25. Ruediger et al (2000), the agencies' "Canada lynx conservation assessment and strategy," considers the Forest within the geographic extent of the lynx strategy.
26. The Montana Department of Fish, Wildlife, and Parks has compiled a database of lynx occurrences and distribution throughout Montana from 1977 -1998. This information was mapped on pages 244 and 247 of Ruggiero et al (1999) and shows numerous lynx occurrences in the Forest.
27. In Squires (2003), the Forest Service documents: "Discussions with local trappers and biologists indicate that lynx were present in the Pioneer Mountains prior to the late 1990's, and had been detected during winter track surveys as recently as 2000 (Forkan 2000). This fact is substantiated by the number of trapped lynx from this area in the 1970s." Elsewhere, the report notes "[f]rom 1977 to 1994, 39 lynx occurrences were recorded in the Pioneer Mountains, including 13 harvested individuals (McKelvey et al. 2000). Snow-track surveys performed as recently as 2000 indicated that lynx were present along the Scenic Byway (Forkan 2000)."

- 1 28. In Squires (2003), the Forest Service documented the results of winter
2 tracking surveys. The record indicates two (2) sets of lynx tracks were
3 found in the Forest near the Project area, within the Big Hole landscape area
4 (which is the analysis area for wildlife security for the Project). The report
5 concludes that “lynx were either absent *or at very low densities* during our
6 study.” (emphasis added).
- 7 29. The U.S. Fish and Wildlife Service’s final map (2003) for lynx shows that
8 the Forest is within the range of both resident and dispersing lynx.
- 9 30. Berger (2009) found one set of potential lynx tracks in the Forest during
10 winter tracking surveys, as well as one set outside the Forest boundary that
11 was heading towards the Forest boundary.
- 12 31. In Devineau (2010), the State of Colorado Division of Wildlife documented
13 locations of radio-collared lynx released in Colorado. The record shows
14 multiple lynx traveling in the Forest (approximately four (4) individuals),
15 including at least two individual lynx traveling in the Project area. One of
16 the individuals inhabited the Madison Range for approximately two weeks.
- 17 32. In litigation over lynx critical habitat in 2010, the U.S. Fish and Wildlife
18 Service admitted that the Forest is occupied for the purpose of designating
19 lynx critical habitat. *Alliance for Wild Rockies v. Lyder*, 728 F.Supp.2d
20 1126, 1133 (D. Mont. 2010)(“Plaintiffs take exception to the Service's
21 failure to designate the Beaverhead-Deerlodge [and certain other National
22 Forests] as lynx critical habitat. [FN4] . . . In response, the government
23 acknowledges the record shows such forests to be occupied”)
- 24 33. The Forest Service’s Fleecer Mountains Watershed Assessment (2009)
25 indicates that lynx are “potentially” “likely to be present” in the Project
26 area. It also states “f]rom 1988 to 1999 there are 72 reports of lynx being
27 trapped or observed in the Pioneers, Big Hole Mountains and Fleecer
28 Range.”
34. The Forest Service admits that thirteen (13) of its formally designated and
mapped “lynx analysis units” may be affected by the Project: 168-German
Gulch; 169-Face; 176-Panama; 185-Delano; 186-Bull Ranch; 190-Bear;
191-Johnson; 192-Guard; 194-(no name); 200-Jerry; 202-Mitchell; 213-
Willow; and 214-Charcoal.

- 1 35. Likewise, in three inventoried roadless area capability assessments
2 completed in 2003, the Forest Service identified high-quality lynx habitat in
3 the Project area.
- 4 36. The Project area contains agency-designated “linkage areas” for the Canada
5 lynx: one on the north end of the Fleecer Project area heading northwest to
6 the Anaconda Mountains and Anaconda-Pintler Wilderness, and one to the
7 southwest heading to the Pioneer Mountains
- 8 37. There is only one record of snow tracking surveys for lynx in the Project
9 area: that survey (conducted in 1993) found possible lynx tracks in the
10 Project area.
- 11 38. In response to comments on the EA for the Project, the Forest Service
12 clarifies that “the EA does *not* state that lynx do not occur in the mountain
13 range.” (emphasis added).
- 14 39. Snowshoe hares, which are the primary prey of lynx, are located throughout
15 the Forest and Project area.
- 16 40. Grizzly bears are present on the Forest, both within designated grizzly bear
17 recovery zones and outside of those zones.
- 18 41. As recently as 2010, grizzly bears have been documented to the north and
19 northwest of the Project area: in the Anaconda-Pintler Wilderness area, in
20 the Flint Creek mountain range, in the John Long Mountains, and on the
21 east end of the Anaconda range. The Anaconda range and Anaconda-Pintler
22 Wilderness area are within the wildlife security analysis area for the Project.
- 23 42. The Forest Service states that the Project area has good connectivity with
24 the Anaconda-Pintler Wilderness.
- 25 43. The Forest Service states that grizzly bears “occur, or are likely to occur” in
26 the Highland Mountains to the southeast of the Project area, which is also
27 within the wildlife security analysis area for the Project.
- 28 44. In 2010, a dead grizzly bear was found northeast of the Project area near Elk
Park, which is also within the wildlife security analysis area for the Project.

1 45. In 2005, a dead grizzly bear was found within the Mount Haggin Wildlife
2 Management Area, which is adjacent to the Project area and within the
3 wildlife security analysis area for the Project.

4 46. The Forest Service admits that there have been recent grizzly sightings on
5 the north end of the Forest.

6 47. The Forest Service admits that grizzly bears “could disperse through” the
7 Project area.

8 48. The Forest Service admits that “[a]s a result [of its connectivity with the
9 Anaconda-Pintler Wilderness], the project area could receive incidental use
10 [by grizzly bears].”

11 49. The Forest Service admits that there are “transitory [grizzly] bears that
12 might move across the project area or mountain range.”

13 50. The Project area contains whitebark pine, which is one of the key and
14 critical food sources for grizzly bear survival. As the U.S. Court of Appeals
15 recently noted:

16 whitebark pine seeds are identified as one of four food sources
17 “important to grizzly bear survival and reproductive success” in
18 the [Greater Yellowstone Area], along with winter-killed
19 ungulates (hoofed mammals), spawning cutthroat trout, and
20 army cutworm moths. []. The pine seeds “serve as an important
21 fall food due to their high fat content and abundance as a
22 pre-hibernation food,” and the bears consume them
23 “extensively” and even “predominantly” when they are
24 available. [] This food source permits the bears to efficiently
25 add weight and store fat before they hibernate for the winter.

26 . . .

27 the Rule repeatedly acknowledges a “well-documented
28 association” between reduced whitebark pine seed abundance
and increased grizzly mortality. [] (noting that whitebark pine
“has been linked to grizzly bear survival and reproduction”); []
 (“During poor whitebark pine years, grizzly bear/human
conflicts are more frequent, resulting in higher numbers of
human-caused grizzly bear mortalities due to defense of life or

1 property and management removals of nuisance bears.”)

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3 *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1024 -1026 (9th
4 Cir. 2011).

5 51. Areas with whitebark pine are so rare that whitebark pine is warranted for
6 listing under the Endangered Species Act. 76 Fed. Reg. 42631 (July 19,
7 2011).

8 52. High road densities in the Project area have degraded habitat for species
9 such as elk and grizzly bears which require large areas with low road
10 densities.

11 53. The Big Hole Landscape is 530,396 acres.

12 54. The Upper Clark Fork Landscape is 82,719 acres.

13 55. The current open motorized road and trail densities, outside of the five week
14 fall rifle hunting season, are 2.0 mi/sq mi. in the Upper Clark Fork and 1.2
15 mi/sq mi. in the Big Hole (which includes the Anaconda-Pintler Wilderness
16 area).

17 56. Hunting District 319 is 287,187 acres.

18 57. Hunting District 341 is 109,927 acres.

19 58. The Forest Service states it will close roads temporarily to achieve an open
20 motorized road and trail densities during the five week fall rifle hunting
21 season of 0.6 in Hunting District 319 and 0.6 in Hunting District 341. It is
22 not clear whether the Forest Service will close roads by locking gates or just
23 by posting a notice by the roads (i.e. honor system method).

24 59. When road density is disclosed according to the more Project-specific 6th
25 Code watershed scale, the record indicates the following road densities for
26 the following watersheds within the Fleecer Mountains Project area:

- 27 a. Big Hole River- Dickie Bridge (16,572 acres) = 2.2 mi/sq.mi
- 28 b. Big Hole River- Meadow Creek (23,816 acres) = 1.8 mi/sq mi
- c. Deep Creek (36,783 acres) = 3.5

- d. French Creek (13,022 acres) = 3.0
- e. Jerry Creek (29,419 acres) = 2.3
- f. North Fork Divide Creek (19,309 acres) = 2.7
- g. Silver Bow Creek - McCleery Gulch (39,087 acres) = 3.0
- h. Upper Divide Creek (23,817 acres) = 2.7

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60. The best available science, Christensen et al (1993), recommends elk habitat effectiveness of 70% in summer range and at least 50% in all other areas where elk are one of the primary resource considerations. According to Figure 1 in Christensen et al (1993), this equates to a maximum road density of approximately 0.7 mi/sq mi. in summer range and approximately 1.7 mi/sq mi. in all other areas.
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61. None of the 6th Code watersheds in the Fleecer Project area meet either of these road density thresholds.
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62. This type of Project level analysis was not disclosed to the public in the EA or DN.
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63. Christensen et al (1993) state that if an area is not meeting the 50% effectiveness threshold of 1.7 mi/sq mi, the agency should admit that the area is not being managed for elk: "Areas where habitat effectiveness is retained at lower than 50 percent must be recognized as making only minor contributions to elk management goals. If habitat effectiveness is not important, don't fake it. Just admit up front that elk are not a consideration."
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64. On a larger, landscape level (cumulative effects) analysis, the Upper Clark Fork fails the 50% effectiveness standard and fails the 70% effectiveness standard for summer range.
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65. Likewise, the other landscape level (cumulative effects) analysis shows that the Big Hole also fails the 70% effectiveness standard for summer range.
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66. Although the Big Hole estimate does not fail the 50% effectiveness threshold, it is averaged over too large an area to be a meaningful estimate of landscape conditions: Christensen (1993) recommends landscape level analyses cover areas that range from 30,000 to 150,000. The Big Hole analysis averages road density over 530,396 acres.
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1 67. The elk population itself is also failing to meet state agency population
2 objectives for the affected Hunting Districts 341 and 319.

3 68. The Forest Service did not provide an analysis of how much of the Project
4 area, Project area watersheds, affected landscape areas, or affected Hunting
5 Districts provide “elk security area[s]” as defined by the Forest Plan, and the
6 best available science, Christensen et al (1993) and Hillis et al (1991), to be
7 “comprised of contiguous 250 acre blocks of forested habitat .5 miles or
8 more from open roads with these blocks encompassing 30% or more of the
9 area.”

10 69. Instead, the Forest Service conducted a modified elk security area analysis
11 by including all forested area in 250 acre blocks at least 1/3 mile from an
12 open road, across all land ownerships. This analysis found that Hunting
13 District 341 has 7% in elk security areas, and Hunting District 319 has 23%
14 in elk security areas, which both fail the threshold set by the Forest Plan and
15 best available science.

16 **Forest Plan**

17 70. The Record of Decision for the Revised Forest Plan states that the Forest
18 Service conducted ESA consultation for the Revised Forest Plan for two
19 species: the gray wolf and the bull trout.

20 71. The Final EIS and Record of Decision for the Revised Forest Plan operate
21 under the premise that the Yellowstone grizzly bear is no longer listed under
22 the ESA. This is an outdated and false premise because the Yellowstone
23 grizzly bear was relisted by federal court order on September 21, 2009.
24 *Greater Yellowstone Coalition v. Servheen*, 672 F.Supp.2d 1105 (D. Mont.
25 2009); *see also* 75 Fed. Reg. 14496 (March 26, 2010)(USFWS rule stating
26 that “all grizzly bears in the lower 48 States are again listed as threatened.”)

27 72. Upon review of all available material on the Forest Service’s website,
28 including all appendices to the Revised Forest Plan, it is apparent that the
agencies have not yet amended the Revised Forest Plan to remove direction
for delisted grizzly bears and add a biological assessment, Biological
Opinion and Incidental Take Statement, and new management standards for
the ESA-listed grizzly bear.

- 1 73. The Fleecer Project EA wildlife analysis and DN do not disclose whether
2 the U.S. Fish and Wildlife Service has issued an Incidental Take Statement
3 for grizzly bears on the Forest, including areas outside the designated
4 grizzly bear recovery zone, and what the reasonable and prudent measures
5 in that statement are.
- 6 74. In response to comments on this Project EA, the Forest Service states that
7 there is a Biological Opinion that was issued on October 4, 2010 that
8 addresses the impacts of the Revised Forest Plan on grizzly bears. The
9 Forest Service does not disclose the contents of that Biological Opinion or
10 indicate whether there is an accompanying Incidental Take Statement with
11 reasonable and prudent measures that must be followed.
- 12 75. At this time, the only enforceable standard for grizzly bears in the Revised
13 Forest Plan still remains “Standard 6: The Grizzly Bear Amendment applies
14 to only the Beaverhead-portion of the BDNF and is incorporated as
15 Appendix G (USDA 2006b).”
- 16 76. The “Grizzly Bear Amendment” was promulgated with the express intention
17 that it would be implemented when grizzly bears were *delisted* from the
18 ESA in the Greater Yellowstone Area.
- 19 77. As noted above, the delisting of those bears was reversed by court order on
20 Sept. 21, 2009. Thus, the “Grizzly Bear Amendment” is legally inadequate
21 for the threatened grizzly bears found within the Beaverhead-Deerlodge
22 National Forest.
- 23 78. Moreover, the Revised Forest Plan has no binding legal standards to protect
24 grizzly bear habitat for grizzlies in the Forest that live outside of the agency-
25 designated “Primary Conservation Area” or “Recovery Zone.”
- 26 79. The Forest Service did not consult with U.S. Fish and Wildlife Service
27 regarding the impacts of the Revised Forest Plan on Canada lynx.
- 28 80. Elk are one of the management indicator species in the Revised Forest Plan.
81. The Revised Forest Plan does not have a single binding legal standard that
limits the percentage of elk cover that can be logged, i.e. there is no hiding
cover, thermal cover, or canopy cover retention standard.

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- 2 82. The Revised Forest Plan does not prohibit motorized recreation and logging
- 3 activities in elk winter range.
- 4 83. The Revised Forest Plan sets two “habitat proxy” standards for elk in the
- 5 Project area by (1) setting a maximum open motorized road and trail density
- 6 of 2.0 mi/sq. mi. in the Upper Clark Fork Landscape and 1.2 mi/sq. mi. for
- 7 the Big Hole Landscape year-round, except during the five week fall rifle
- 8 hunting season, and by (2) setting a maximum open motorized road and trail
- 9 density goal for Hunting District 319 at 0.6 mi/sq mi and Hunting District
- 10 341 at 0.5 mi/sq mi during the five week fall rifle hunting season.
- 11 84. The Forest Service cites Christensen et al (1993), Wisdom et al. (2004), and
- 12 the “Grizzly Bear Amendment” as the scientific bases for the Revised Forest
- 13 Plan’s elk road density thresholds.
- 14 85. Of those three citations, neither Wisdom et al (2004) nor the “Grizzly Bear
- 15 Amendment” provides recommendations for numeric road density standards
- 16 for elk. Only Christensen et al (1993) provides numeric road density
- 17 threshold recommendations for elk.
- 18 86. Christensen et al (1993) recommends elk habitat effectiveness of 70% in
- 19 summer range and at least 50% in all other areas where elk are one of the
- 20 primary resource considerations. According to Figure 1 in Christensen et al
- 21 (1993), this equates to a maximum road density of approximately 0.7 mi/sq
- 22 mi. in summer range and approximately 1.7 mi/sq mi. in all other areas.
- 23 87. These recommendations were not followed in the Revised Forest Plan and
- 24 the Forest Service fails to provide a rational justification for the deviation
- 25 from these recommendations.

23 **Project Description**

- 24 88. The Project is located within the Fleecer watershed, which is within the Big
- 25 Hole and Upper Clark Fork Landscape areas, and southeast of Anaconda,
- 26 Montana and southwest of Butte, Montana. The Anaconda range and
- 27 Anaconda Pintler Wilderness area are located to northwest, the Pioneer
- 28 Mountains are located to the south, and the Highland Mountains are located
- to the southeast.

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2 89. The Project allows commercial clearcut logging on 1,137 acres, commercial
3 selective logging on 480 acres of Douglas-fir stands, non-commercial
4 thinning on 620 acres of Douglas-fir in grass-shrub parks, removing
5 conifers in 117 acres of riparian-associated aspen stands, and within 25
6 acres of upland clones, precommercial thinning on 689 acres of
7 sapling-sized trees in old harvest units, replacing four undersized and
misaligned culverts, and installing two fish barriers to secure habitat for
westslope cutthroat trout.

8 90. The Project also includes 4.99 miles of new “temporary” road construction,
9 as well as the “temporary” reopening, reconstruction, and use of formerly
10 closed roads. The EA indicates that approximately 3.84 miles of formerly
11 closed roads will be reconstructed and reopened.

12 91. One formerly closed road will be reopened and used to access a commercial
13 logging unit in designated summer “secure” habitat. The agency states that
14 “[a]pproximately 200 acres of summer secure habitat could be affected over
one season during salvage of this unit.”

15 92. The roads constructed and re-opened for the Project will be obliterated after
16 the Project is completed.

17 93. The Forest Service estimates that the commercial logging will take up to
18 five (5) years to complete. The noncommercial aspects of the Project are
19 dependent on funding and could take up to ten (10) years.

20 94. During the pendency of the Project, these new and reopened roads will be
21 nominally closed to the public with a posted notice: “Temporary roads will
22 be closed to the public through a forest order. Advance notice and
appropriate signs will be used to inform the public of the closures.”

23 95. During the pendency of the Project, these new and reopened roads will not
24 be closed to the public with a locked gate.

25 96. This “honor system” of road closure is only moderately effective – at best –
26 at protecting elk habitat according to Christensen (1993).

27 97. Although roads will be nominally closed to the public, they will be in
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1 regular use by the agency and contractors for the Project.

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3 98. The Project will increase temporary open road and trail density in the
4 Project area during the five (5) to ten (10) year duration of the Project.

5 99. During the five week hunting season, open road and trail density will
6 increase during the Project from 0.65 to 0.66 in Hunting District 319 and
7 from 0.59 to 0.69 in Hunting District 341.

8 100. During all other times outside of the five week hunting season, open road
9 and trail density will increase during the Project from 1.15 to 1.16 in the Big
10 Hole Landscape and 2.01 to 2.02 in the Upper Clark Fork landscape.

11 101. The Forest Service concedes the Project will change stand structure and
12 species composition, as well as cause disturbance effects due to increased
13 traffic, human activity, and equipment use, in mapped lynx habitat.

14 102. The Forest Service admits that the Project will clearcut 1,009 acres “of lynx
15 habitat,” commercial log (“thin”) 279 acres of lynx habitat, and
16 precommercial thin another 267 acres of lynx habitat.

17 103. The Forest Service does not disclose how the Project will affect lynx
18 “linkage areas” and whether the Project complies with the Northern Rockies
19 Lynx Management Direction Standard ALL S1 that “vegetation
20 management projects must maintain habitat connectivity in an LAU and/or
21 linkage area.”

22 104. The Forest Service does not disclose, discuss, and/or apply the best
23 available science regarding what habitat protections are necessary for ESA-
24 listed grizzly bears. As indicated in the Interagency Grizzly Bear
25 Committee’s records grizzly bear habitat must maintain appropriate density
26 thresholds for open and total motorized routes, and appropriate percentage
27 core habitat retention. As indicated in Schwartz et al (2010), secure habitat
28 is not enough; road density must also be restricted in nonsecure habitat.

105. Instead of addressing and applying the best available science for listed
grizzly bears, the Forest Service refers to a security definition for delisted
bears (the “Grizzly Bear Amendment”) and road density reports developed
for elk (Christensen et al (1993) and Wisdom et al (2004)) which do not

1 mention, and are therefore not relevant to, grizzly bears. Nonetheless, the
2 Project does not comply with the security definition because the Project
3 authorizes road use and clearcut logging within “security” areas.

4 106. Funding for this Project is not guaranteed. The Forest Service estimates that
5 the balance between all income and costs associated with all activities for
6 this Project is -\$33,000. In other words, this Project is a financial loss to
the agency (and federal taxpayers) of \$33,000.

7 **VII. CLAIMS FOR RELIEF**

8 **FIRST CLAIM FOR RELIEF**

9 The Project analysis and impacts on ESA-listed grizzly bears 10 violate ESA, NEPA and NFMA.

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12 107. All previous paragraphs are incorporated by reference.

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14 108. The U.S. Court of Appeals for the Ninth Circuit holds that “[o]nce an
15 agency is aware that an endangered species *may be present* in the area of its
16 proposed action, the ESA requires it to prepare a biological assessment . . .
.” *Thomas v. Peterson*, 753 F. 2d 754, 763 (9th Cir. 1985)(emphasis added).

17 109. “[U]nder the ESA, agencies are required to assess the effect on endangered
18 species of projects in areas where such species *may be present*. []. A failure
19 to prepare a biological assessment is comparable to a failure to prepare an
20 environmental impact statement.” *Thomas v. Peterson*, 753 F.2d 754, 764
(9th Cir. 1985)(emphasis added).

21 110. The legal standard to determine whether ESA consultation is required is
22 different than the legal standard used to determine whether ESA critical
23 habitat designation is required – the critical habitat standard requires that an
24 area is “occupied” by the species; the consultation standard requires only
that a species “may be present.”

25 111. The biological assessment must apply the best available science.

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27 112. If the biological assessment concludes that the proposed action “may affect”
28 but will “not adversely affect” a threatened or endangered species, the

1 action agency must consult informally with the appropriate expert agency.
2 50 C.F.R. §§ 402.14 (b)(1), 402.12(k)(1).

3 113. Grizzly bears are listed under the ESA.

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5 114. The best available science – which includes multiple recent sightings of
6 grizzly bears within the wildlife security analysis area for the Project, good
7 connectivity between the Project area and important wilderness habitat,
8 presence of the critical food source whitebark pine, and the undisputed
9 potential for grizzly bears to travel through the area – indicates that grizzly
bears “may be present” in the Project area at some point during the five to
ten years of Project implementation.

10 115. The proposed Project may affect bears by temporarily increasing road
11 density, allowing logging in security areas, and engaging in mechanized
12 activities that could displace bears.

13 116. Despite the evidence to the contrary, the Forest Service concludes that the
14 Project could have no possible effect on grizzly bears.

15 117. The Forest Service did not complete a biological assessment for grizzly
16 bears for the Project, even though the U.S. Fish and Wildlife Service states
17 that both resident and transient grizzly bears may be present on the Forest.

18 118. The Forest Service did not ask the U.S. Fish and Wildlife Service whether
19 grizzly bears may be present in the Project area.

20 119. The Forest Service did not consult with U.S. Fish and Wildlife Service
21 regarding the Project’s potential impacts on grizzly bears.

22 120. The Forest Service’s failure to complete a biological assessment and/or
23 consult with U.S. Fish and Wildlife Service violates the ESA.

24 121. The Forest Service’s conclusion that the Project could have no possible
25 effect on grizzly bears is arbitrary and capricious and violates the ESA.

26 122. Any potential statement by the U.S. Fish and Wildlife Service that grizzly
27 bears could not be present in the Project area is arbitrary and capricious and
28 violates the ESA.

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2 123. The Forest Service’s failure to take a hard look at potential grizzly presence
3 and the Project’s potential impacts on grizzly bears using the best available
4 science, including the agency’s failure to assess the Project’s impacts on
5 grizzly bear travel/linkage corridors, and failure to disclose that a dead
6 grizzly bear was found in the state wildlife management area adjacent to the
7 Project area, violates NEPA.

8 124. The Forest Service’s failure to acknowledge, disclose, discuss, and apply
9 the best available science on appropriate management for ESA-listed grizzly
10 bears in the Project EA and DN violates NFMA.

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SECOND CLAIM FOR RELIEF

The Project analysis and impacts on ESA-listed Canada lynx
violate the ESA, NEPA, and NFMA.

125. All previous paragraphs are incorporated by reference.

126. The U.S. Court of Appeals for the Ninth Circuit holds that “[o]nce an
agency is aware that an endangered species *may be present* in the area of its
proposed action, the ESA requires it to prepare a biological assessment . . .
.” *Thomas v. Peterson*, 753 F. 2d 754, 763 (9th Cir. 1985)(emphasis added).

127. “[U]nder the ESA, agencies are required to assess the effect on endangered
species of projects in areas where such species *may be present*. []. A failure
to prepare a biological assessment is comparable to a failure to prepare an
environmental impact statement.” *Thomas v. Peterson*, 753 F.2d 754, 764
(9th Cir. 1985)(emphasis added).

128. The legal standard to determine whether ESA consultation is required is
different than the legal standard used to determine whether ESA critical
habitat designation is required – the critical habitat standard requires that an
area is “occupied” by the species; the consultation standard requires only
that a species “may be present.”

129. The biological assessment must apply the best available science.

- 1 130. If the biological assessment concludes that the proposed action “may affect”
2 but will “not adversely affect” a threatened or endangered species, the
3 action agency must consult informally with the appropriate expert agency.
4 50 C.F.R. §§ 402.14 (b)(1), 402.12(k)(1).
- 5 131. Canada lynx are listed under the ESA.
- 6 132. The best available science – including positive survey results from the only
7 winter lynx tracking survey ever conducted in the Project area, records that
8 at least two radio-collared lynx recently traveled through the Project area,
9 presence of thirteen lynx analysis units and two linkage areas within the
10 area, close proximity to the two lynx trails found in Squires (2003),
11 presence of primary prey snowshoe hare, agency admission in Fleecer
12 Watershed Assessment (2009) that lynx potentially may be present in the
13 area, records of dozens of lynx being trapped or observed in the Pioneers,
14 Big Hole Mountains and Fleecer Range between 1988 and 1999, and the
15 agency’s statement that “the EA does *not* state that lynx do not occur in the
16 mountain range” – indicates that lynx “may be present” in the Project area at
17 some point during the five to ten years of Project implementation.
- 18 133. The proposed Project may affect lynx by temporarily increasing road
19 density, removing vegetative cover and habitat, engaging in activities that
20 could displace lynx, and affecting linkage areas.
- 21 134. The Forest Service did not ask the U.S. Fish and Wildlife Service whether
22 lynx may be present in the Project area
- 23 135. The Forest Service did not complete a biological assessment for lynx for the
24 Project.
- 25 136. The Forest Service did not consult with U.S. Fish and Wildlife Service
26 regarding the Project’s potential impacts on lynx.
- 27 137. The wildlife analysis in the Project EA does not even acknowledge that lynx
28 are listed under the ESA.
138. The Forest Service’s failure to complete a biological assessment and consult
with U.S. Fish and Wildlife Service violates the ESA.

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2 139. The Forest Service’s conclusion that the Project could have no possible
3 effect on lynx is arbitrary and capricious and violates the ESA.

4 140. Any potential statement by the U.S. Fish and Wildlife Service that lynx
5 could not be present in the Project area is arbitrary and capricious and
6 violates the ESA.

7 141. The Forest Service’s failure to take a hard look at lynx presence and the
8 Project’s potential impacts on lynx using the best available science,
9 including the agency’s failure to assess the Project’s impacts on lynx
travel/linkage corridors, violates NEPA.

10 142. The Forest Service’s failure to acknowledge, disclose, discuss, and apply
11 the Forest Plan standard for lynx linkage areas violates NFMA.

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THIRD CLAIM FOR RELIEF

The Forest Plan analysis and impacts on ESA-listed grizzly bear
violate ESA, NFMA, and NEPA.

143. All previous paragraphs are incorporated by reference.

144. The U.S. Court of Appeals for the Ninth Circuit holds that “[o]nce an
agency is aware that an endangered species *may be present* in the area of its
proposed action, the ESA requires it to prepare a biological assessment . . .
.” *Thomas v. Peterson*, 753 F. 2d 754, 763 (9th Cir. 1985)(emphasis added).

145. “[U]nder the ESA, agencies are required to assess the effect on endangered
species of projects in areas where such species *may be present*. []. A failure
to prepare a biological assessment is comparable to a failure to prepare an
environmental impact statement.” *Thomas v. Peterson*, 753 F.2d 754, 764
(9th Cir. 1985)(emphasis added).

146. The legal standard to determine whether ESA consultation is required is
different than the legal standard used to determine whether ESA critical
habitat designation is required – the critical habitat standard requires that an
area is “occupied” by the species; the consultation standard requires only

1 that a species “may be present.”

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3 147. The biological assessment must apply the best available science.

4 148. If the biological assessment concludes that the proposed action “may affect”
5 but will “not adversely affect” a threatened or endangered species, the
6 action agency must consult informally with the appropriate expert agency.
50 C.F.R. §§ 402.14 (b)(1), 402.12(k)(1).

7 149. If the action “is likely to adversely affect” a listed species, the action agency
8 must formally consult with the expert agency, and the expert agency must
9 provide the action agency with a Biological Opinion explaining how the
10 proposed action will affect the species or its habitat. 16 U.S.C. § 1536(a-c);
50 C.F.R. § 402.14.

11 150. If the Biological Opinion concludes that the proposed action will jeopardize
12 the continued existence of a listed species, it must outline “reasonable and
13 prudent alternatives,” if any are available, that would allow an action
14 agency to carry out the purpose of its proposed activity without jeopardizing
15 the existence of listed species. 16 U.S.C. § 1536(b)(3)(A).

16 151. If the Biological Opinion concludes that the action will not result in
17 jeopardy but may incidentally “take” or “harm” a protected species, the
18 expert agency has authority to provide the action agency with an “incidental
19 take statement.” This statement must specify the impact of such incidental
20 taking on the species, set forth “reasonable and prudent measures” that the
21 expert agency considers necessary to minimize such impact, and include the
“terms and conditions” that the action agency must comply with to
implement those measures. 16 U.S.C. § 1536(b)(4).

22 152. If the action agency adopts such measures and implements their terms and
23 conditions, the resulting level of incidental take authorized in the incidental
24 take statement is excepted from the ESA’s ban on take.

25 153. During this assessment process, the agencies must use the best available
26 science.

27 154. As defined in the ESA’s regulations, an “action” subject to consultation
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1 includes all activities or programs of any kind authorized, funded, or carried
2 out, in whole or in part, by Federal agencies in the United States or upon the
3 high seas. Examples include, but are not limited to: (a) actions intended to
4 conserve listed species or their habitat; (b) the promulgation of regulations;
5 (c) the granting of licenses, contracts, leases, easements, rights-of-way,
6 permits, or grants-in-aid; or (d) actions directly or indirectly causing
7 modifications to the land, water, or air. 50 C.F.R. § 402.02.

8 155. The U.S. Court of Appeals for the Ninth Circuit holds that this regulatory
9 language “admit[s] of no limitations” and that “there is little doubt that
10 Congress intended to enact a broad definition of agency action in the ESA . .
11 . . .” *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994)

12 156. Thus, ESA consultation is required for individual projects as well as for the
13 promulgation of land management plans and standards. *Id.*

14 157. “Only after the Forest Service complies with § 7(a)(2) can any activity that
15 may affect the protected [species] go forward.” *Pacific Rivers*, 30 F.3d at
16 1056-57.

17 158. Grizzly bears are listed under the ESA.

18 159. Grizzly bears may be present on the Forest, both within the Yellowstone
19 grizzly bear recovery area, as well as outside of that recovery area,
20 including in the Big Hole Landscape area according to multiple records of
21 grizzly bear presence there.

22 160. The Forest Service did not ask the U.S. Fish and Wildlife Service where
23 grizzly bears may be present on the Forest outside the 2004 distribution
24 lines, according to the most recent occurrence data and best available
25 science, including whether grizzly bears may be present now in the Big
26 Hole Landscape area.

27 161. The Forest Service did not prepare a biological assessment and consult with
28 U.S. Fish and Wildlife Service regarding the impact of the Revised Forest
Plan on the threatened grizzly bear in all areas across the Forest where
grizzly bears may be present.

1 162. The biological opinion for the Revised Forest Plan apparently is based on
2 grizzly bear distribution in 2004, which is eight year old data that no longer
3 represents the best available science on where grizzly bears may be present
4 on the Forest.

5 163. Any potential statement by the U.S. Fish and Wildlife Service that grizzly
6 bears could not be present on the Forest outside the 2004 distribution lines
7 is arbitrary and capricious and violates the ESA.

8 164. There is no scientifically sound incidental take statement for the Revised
9 Forest Plan for the threatened grizzly bear that includes reasonable and
10 prudent measures for all areas where grizzly bears may be present across the
11 Forest.

12 165. The agencies' failure to promulgate an adequate biological assessment,
13 Biological Opinion, and Incidental Take Statement for the Revised Forest
14 Plan that addresses all grizzly bears across the Forest violates the ESA.

15 166. The Forest Service's failure to take a hard look and include appropriate
16 standards for ESA-listed grizzly bears within the Forest Plan, in a
17 supplemental NEPA process, violates NEPA. *See Pacific Rivers Council v.*
18 *U.S. Forest Service*, --- F.3d ----, 2012 WL 336133 (9th Cir. 2012). The
19 relisting of the grizzly bear was a significant new circumstance that requires
20 supplemental NEPA analysis for the Forest Plan.

21 167. The Forest Service's failure to amend the Forest Plan to include binding
22 legal standards aimed at recovering and conserving the ESA-listed grizzly
23 bear on the Forest violates NFMA.

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FOURTH CLAIM FOR RELIEF

The Forest Plan analysis and impacts on ESA-listed lynx
violate ESA, NFMA, and NEPA.

168. All previous paragraphs are incorporated by reference.

169. The U.S. Court of Appeals for the Ninth Circuit holds that “[o]nce an
agency is aware that an endangered species *may be present* in the area of its

1 proposed action, the ESA requires it to prepare a biological assessment . . .
2 .” *Thomas v. Peterson*, 753 F. 2d 754, 763 (9th Cir. 1985)(emphasis added).

3 170. “[U]nder the ESA, agencies are required to assess the effect on endangered
4 species of projects in areas where such species *may be present*. []. A failure
5 to prepare a biological assessment is comparable to a failure to prepare an
6 environmental impact statement.” *Thomas v. Peterson*, 753 F.2d 754, 764
(9th Cir. 1985)(emphasis added).

7 171. The legal standard to determine whether ESA consultation is required is
8 different than the legal standard used to determine whether ESA critical
9 habitat designation is required – the critical habitat standard requires that an
10 area is “occupied” by the species; the consultation standard requires only
11 that a species “may be present.”

12 172. The biological assessment must apply the best available science..

13 173. If the biological assessment concludes that the proposed action “may affect”
14 but will “not adversely affect” a threatened or endangered species, the
15 action agency must consult informally with the appropriate expert agency.
16 50 C.F.R. §§ 402.14 (b)(1), 402.12(k)(1).

17 174. If the action “is likely to adversely affect” a listed species, the action agency
18 must formally consult with the expert agency, and the expert agency must
19 provide the action agency with a Biological Opinion explaining how the
20 proposed action will affect the species or its habitat. 16 U.S.C. § 1536(a-c);
21 50 C.F.R. § 402.14.

22 175. If the Biological Opinion concludes that the proposed action will jeopardize
23 the continued existence of a listed species, it must outline “reasonable and
24 prudent alternatives,” if any are available, that would allow an action
25 agency to carry out the purpose of its proposed activity without jeopardizing
26 the existence of listed species. 16 U.S.C. § 1536(b)(3)(A).

27 176. If the Biological Opinion concludes that the action will not result in
28 jeopardy but may incidentally “take” or “harm” a protected species, the
expert agency has authority to provide the action agency with an “incidental
take statement.” This statement must specify the impact of such incidental

1 taking on the species, set forth “reasonable and prudent measures” that the
2 expert agency considers necessary to minimize such impact, and include the
3 “terms and conditions” that the action agency must comply with to
4 implement those measures. 16 U.S.C. § 1536(b)(4).

5 177. If the action agency adopts such measures and implements their terms and
6 conditions, the resulting level of incidental take authorized in the incidental
7 take statement is excepted from the ESA’s ban on take.

8 178. During this assessment process, the agencies must use the best available
9 science.

10 179. As defined in the ESA’s regulations, an “action” subject to consultation
11 includes all activities or programs of any kind authorized, funded, or carried
12 out, in whole or in part, by Federal agencies in the United States or upon the
13 high seas. Examples include, but are not limited to: (a) actions intended to
14 conserve listed species or their habitat; (b) the promulgation of regulations;
15 (c) the granting of licenses, contracts, leases, easements, rights-of-way,
16 permits, or grants-in-aid; or (d) actions directly or indirectly causing
17 modifications to the land, water, or air. 50 C.F.R. § 402.02.

18 180. The U.S. Court of Appeals for the Ninth Circuit holds that this regulatory
19 language “admit[s] of no limitations” and that “there is little doubt that
20 Congress intended to enact a broad definition of agency action in the ESA . .
21 . . .” *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994).

22 181. Thus, ESA consultation is required for individual projects as well as for the
23 promulgation of land management plans and standards. *Id.*

24 182. “Only after the Forest Service complies with § 7(a)(2) can any activity that
25 may affect the protected [species] go forward.” *Pacific Rivers*, 30 F.3d at
26 1056-57.

27 183. Canada lynx are listed under the ESA.

28 184. According to best available science, in part discussed above in paragraphs
29 24-39 and 132, Canada lynx may be present on the Forest.

- 1 185. The Forest is currently under consideration for designation as lynx critical
2 habitat.
- 3 186. The Forest Service did not ask the U.S. Fish and Wildlife Service whether
4 lynx may be present on the Forest.
- 5 187. The Forest Service did not prepare a biological assessment and consult with
6 U.S. Fish and Wildlife Service regarding the impact of the Revised Forest
7 Plan on the threatened Canada lynx.
- 8 188. There is no Biological Opinion and/or Incidental Take Statement for the
9 Revised Forest Plan for the threatened Canada lynx.
- 10 189. The Forest Service's failure to complete a biological assessment and consult
11 with U.S. Fish and Wildlife Service violates the ESA.
- 12 190. The Forest Service's conclusion that there is no possibility that lynx may be
13 present on the Forest is arbitrary and capricious and violates the ESA.
- 14 191. Any potential statement by the U.S. Fish and Wildlife Service that lynx
15 could not be present on the Forest is arbitrary and capricious and violates
16 the ESA.
- 17 192. The Forest Service's failure to take a hard look at lynx presence and the
18 Forest Plan's potential impacts on lynx, using the best available science,
19 including the agency's failure to assess the Forest Plan's impacts on lynx
20 travel/linkage corridors, violates NEPA. *See Pacific Rivers Council v. U.S.*
Forest Service, --- F.3d ---, 2012 WL 336133 (9th Cir. 2012).
- 21 193. The Forest Service's failure to include binding legal standards aimed at
22 conserving and recovering ESA-listed lynx on the Forest in the Forest Plan
23 violates NFMA.

24 FIFTH CLAIM FOR RELIEF

25 The Forest Service's predetermined decision to make a
26 finding of no significant impact for the Project violates NEPA.
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- 1 194. All previous paragraphs are incorporated by reference.
- 2 195. The purpose of NEPA is to assess environmental effects of a proposed
- 3 action before a decision is made.
- 4 196. The purpose of completing an EA is to determine whether an action could
- 5 have significant effects that need to be addressed in a full environmental
- 6 impact statement (EIS).
- 7 197. Assuming and concluding that an action will not have significant impacts
- 8 before even conducting the EA violates NEPA: “The Forest Service violated
- 9 NEPA by using its statement of reasons to support a pre-determined
- 10 outcome that an EIS won’t be necessary.” *Helena Hunters and Anglers v.*
- 11 *Tidwell*, CV-08-162,(D. Mont. 2009)(internal quotation marks omitted).
- 12 198. The Forest Service mailed a scoping letter for the Project to the public on
- 13 November 27, 2009.
- 14 199. The Forest Service listed the Project proposal in its Schedule of Proposed
- 15 Actions on July 1, 2010.
- 16 200. The Forest Service held a field trip for the Project on September 10, 2010.
- 17 201. The Forest Service provided the EA to the public for public comment in
- 18 February 2011.
- 19 202. The Forest Service issued the final EA in September 2011.
- 20 203. The Decision Notice and Finding of No Significant Impact was signed
- 21 September 14, 2011.
- 22 204. Prior to mailing the scoping notice to the public on November 29, 2009, the
- 23 Forest Service had already concluded that it would ultimately decide that
- 24 the Project would not have a significant impact.
- 25 205. On November 19, 2009, the Forest Service sent out an internal “project
- 26 initiation letter” which informed the agency managers that the Forest
- 27 Service intended to conclude analysis for the Project with a Decision Notice
- 28

1 and Finding of No Significant Impact.

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3 206. Thus, almost two years before the EA analysis was completed, indeed
4 before the EA analysis had even started, the Forest Service had already
5 reached a predetermined outcome that the Project would not have a
6 significant impact.

7 207. The Forest Service clarified this predetermined outcome in interdisciplinary
8 team meeting notes on September 1, 2010, five months *before* the draft EA
9 was published, which note that the Forest Service manager organizing the
10 Project told other managers that she needed documentation to substantiate
11 the finding of no significant impact that the agency ultimately planned to
12 publish: "Please review the context and intensity factors for (non)
13 significance when you estimate your effects. . . .I will need to refer to your
14 reports to substantia[te] a FONSI."

15 208. The Forest Service's predetermined "no significant impact" outcome
16 violates NEPA.

17 209. The Project may or will have a significant impact because it involves (a)
18 clearcutting over 1,000 acres, with many units larger than the 40 acre limit;
19 (b) building new temporary roads in an area that already has a road density
20 that fails the Forest Plan threshold for road density in elk habitat; (c) using a
21 closed road in a wildlife security area; (d) logging in elk winter range during
22 winter; (e) failing to conduct ESA consultation for the Project despite
23 documented lynx and grizzly bear presence in the wildlife security analysis
24 area for the Project; (f) failing to address the legal standard for lynx linkage
25 areas; (g) failing to adequately assess the controversy and uncertainty about
26 whether the Project area is a wildlife corridor for ESA species such as lynx
27 and grizzly bears, and thus is an ecologically critical area; (h) failing to
28 comply with elk security area thresholds; (i) failing to comply with best
available science thresholds for summer range elk habitat effectiveness; and
more.

29 210. The Forest Service must reassess the potential significance of the Project in
30 a supplemental EA or EIS without relying on its predetermined decision to
31 find no significant impact.

SIXTH CLAIM FOR RELIEF

The Project and Forest Plan analysis and impacts on elk violate NFMA and NEPA.

211. All previous paragraphs are incorporated by reference.

212. In a NEPA analysis, the Forest Service must assess direct, indirect, and cumulative effects of a proposed action.

213. In a project analysis, the Forest Service must apply the best available science.

214. The Revised Forest Plan and best available science define “elk security area” as “comprised of contiguous 250 acre blocks of forested habitat .5 miles or more from open roads with these blocks encompassing 30% or more of the area.”

215. The EA did not acknowledge this definition or apply it in the analysis of elk security.

216. The record indicates that the Project area does not comply with this definition.

217. The agency does not provide a scientific basis for the road density thresholds it relies upon as the sole binding legal standard for elk management. The Forest Service cites Christensen et al (1993), Wisdom et al (2004), and the “Grizzly Bear Amendment” as the scientific basis for the elk road density thresholds in the Revised Forest Plan but none of these citations recommends the high permanent road densities and unlimited increases in temporary road densities adopted in the Revised Forest Plan.

218. The only one of these three papers that recommends road density thresholds in elk habitat is Christensen (1993), which recommends a road density of approximately 0.7 in elk summer range. The Forest Service cites Christensen (1993) as the best available science but did not use this recommendation in either the Forest Plan or the Project EA.

219. Moreover, Christensen (1993) recommends that the Forest Service conduct

1 elk analysis at both the site-specific project level of 3,000 to 10,000 acres,
2 as well as at the elk herd unit, or habitat analysis units, or meaningful larger
3 landscape units of 30,000 to 150,000 acres. In particular, Christensen
4 (1993) emphasizes using the elk herd unit as the analysis level. The Forest
5 Service cites Christensen (1993) as the best available science but did not use
6 these recommendations in either the Forest Plan or the Project EA.

6 220. Despite the best available science addressing elk sensitivity on winter range,
7 the agency fails to create a Forest Plan standard or Project restriction that
8 prohibits disturbance of elk on all winter range.

9 221. Due to the lack of effective habitat protections, elk in both Hunting Districts
10 in the Project area are currently failing state population objectives.

11 222. Despite the lack of scientifically based habitat protections in the Revised
12 Forest Plan and the poor elk population numbers in the affected analysis
13 area, the Project will increase temporary road density in the Project area
14 above the levels recommended in the best available science, reduce elk
15 security above the level recommended by the best available science, and
16 allow commercial logging in elk winter range during the winter.

16 223. The agency's failure to take a hard look at the application of the best
17 available science to the Project and failure to address the cumulative effects
18 of the Project and Forest Plan violate NEPA.

19 224. The agency's failure to consider and/or apply the best available science to
20 the Project and Forest Plan, and failure to comply with Forest Plan Wildlife
21 Standard 1 and the Forest Plan definition of elk security area, violates
22 NFMA.

22 **VIII. RELIEF REQUESTED**

23 For all of the above stated reasons, Plaintiffs request that this Court award the
24 following relief:

25 A. Declare that the Project violates the law;

26 B. Enjoin implementation of the Project;

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C. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under the ESA or under EAJA; and

D. Grant Plaintiffs any such further relief as may be just, proper, and equitable.

Respectfully submitted this 21st Day of February, 2012.

/s/ Rebecca K. Smith
Rebecca K. Smith
PUBLIC INTEREST DEFENSE CENTER, PC

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