

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

Timothy M. Bechtold
Rossbach Hart Bechtold, P.C.
401 North Washington Street
P.O. Box 8988
Missoula, MT 59807-8988
(406) 543-5156
(406) 728-8878 fax
tim@rossbachlaw.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

I. INTRODUCTION

1. Plaintiffs Alliance for the Wild Rockies and Native Ecosystems Council hereby challenge the Main Boulder Fuels Reduction Project. The site of the proposed Main Boulder project area has spectacular mountain scenery and provides outstanding hunting, backcountry skiing, snowmobiling, hiking and other outdoor recreation opportunities. The area is also critical habitat for a variety of native wildlife species.
2. Plaintiffs seek a judgment declaring that the United States Forest Service's (Forest Service) decision to log the Main Boulder project has violated the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Endangered Species Act (ESA), the Administrative Procedure Act (APA) and their implementing regulations.
3. Plaintiffs seek a judgment declaring that the United States Fish and Wildlife Service (FWS) has violated the APA and ESA by: 1) issuing a concurrence that authorizes activities in grizzly bear habitat adjacent to a grizzly recovery zone that adversely affect the physical or biological habitat features that are essential to the conservation of the grizzly bear; and 2) failing to use the best scientific and commercial data available in assessing the current status of the grizzly bear in the project area, and in assessing the effects of the proposed action on grizzly bears.

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the Plaintiffs' claims by virtue of 28 U.S.C. § 1331 (federal question).
2. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a) (Declaratory Judgment). Plaintiffs sent a 60-day notice of intent to sue under the ESA on September 26, 2005.

1
2
3
4
5
6
7
8
9
10
11
12
13
14

3. Venue in this case is proper under 28 U.S.C. § 1391(e) and LR 3.3(a)(1). Defendant Kimbell, an officer of the Forest Service with offices in Missoula, Montana, resides within the Missoula Division of the United States District Court for the District of Montana, and is the principal representative in this District of the Defendant Forest Service. The issues raised by Plaintiffs are recurring region-wide issues, as it is the Regional Forester who is responsible for protecting species whose range encompasses more than one national forest. Thus, Plaintiffs' primary dispute continues to be with the Regional Forester. The challenged decisions were upheld by the Regional Forester, and are representative of official policies and procedures common to the Northern Region, which Plaintiffs seek to change through this litigation.

III.

PARTIES

1. Plaintiff Alliance for the Wild Rockies (AWR) is a tax-exempt, non-profit public interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plants, fish, and animal life, and its naturally functioning ecosystems. Its registered office is located in Missoula, Montana. AWR has over 2,000 individual members, many of whom reside in Montana, and more than 600 member businesses and organizations, many of which are located in Montana. Members of AWR work as fishing guides, outfitters, and researchers who are directly affected by the declining wildlife

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

habitat at issue herein and the failure of the Defendants to take the steps required by law to protect and conserve this habitat. Members also observe, enjoy and appreciate Montana’s native wildlife and the water quality of aquatic ecosystems in Montana’s lakes and streams as well as the habitat quality of terrestrial ecosystems upon which they depend, and expect to continue to do so in the Main Boulder Project area. The past, present, and future enjoyment of these benefits by AWR and its members has been, is being, and will continue to be irreparably harmed by Defendants’ failure to comply with the NEPA, NFMA, ESA, and the APA.

2. Plaintiff Native Ecosystems Council is a non-profit environmental organization based in Three Forks, Montana. Native Ecosystems Council works to protect native ecosystems on public lands in the Northern Rockies.
3. Members of the Plaintiff organizations reside near the Boulder River affected by the proposed Main Boulder timber sale. These members use and enjoy this area for recreational, scientific, inspirational, business, educational and other purposes on a continuing and regular basis and intend to do so frequently in the future.
4. The above-described aesthetic, conservational, recreational, scientific, economic, educational, and native species preservation interests of the Plaintiffs have been, are being and, unless the relief prayed for herein is granted, will continue to be adversely and irreparably injured by the Defendants’ failure to comply with the NEPA, NFMA, APA, ESA and their implementing regulations.
5. Plaintiffs have a strong interest in maintaining the biological diversity and ecological integrity of national forests in Montana. Accordingly Plaintiffs have an interest in the enforcement and administration of environmental laws, including ESA, NEPA and NFMA. Plaintiffs fully participated in the administrative

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

review of the Main Boulder timber sale, including formally appealing the proposed sale with the Forest Service Regional Forester for Region One. The Plaintiff organizations bring this action on their own behalf and on behalf of their immediate and adversely affected members.

6. Defendant Abigail Kimbell is the Regional Forester for the Northern Region of the United States Forest Service. The Gallatin National Forest is an administrative unit of the Northern Region. Defendant Kimbell is sued in her official capacity.
7. Defendant United States Forest Service is an agency of the U.S. Department of Agriculture.
8. Defendant United States Fish and Wildlife Service is an agency of the U.S. Department of Interior. The ESA mandates that the FWS manage listed terrestrial species such as grizzly bears. The ESA also obligates the agency to work toward recovery of listed species, and use the best data available in assisting other agencies to insure that federal activities will not jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat. The failure of the FWS to adequately consider grizzly recovery, the agency's failure to use the best science in assessing the Main Boulder project, and its arbitrary conclusion regarding that project's effects on bears brings the agency within the purview of this litigation.

IV. FACTUAL BACKGROUND

A. The Main Boulder Area

1. The Main Boulder River Corridor consists of a strip of non-wilderness National Forest land approximately 24 miles long and one-half mile wide. The Absaroka-Beartooth Wilderness, which encompasses approximately

1
2
3
4
5
6
7
8
9
10
11
12
13
14

1,000,000 acres, borders the river corridor for about two-thirds of its length. The river corridor consists of a “box canyon” with steep sides characteristic of glaciated landscapes. The Boulder River flows roughly 3000-4000 feet below high elevation plateaus on either side of the canyon. The drainage is characterized by a combination of densely timbered hillsides, lightly timbered, steep rocky slopes, and occasional meadows. The majority of the one-half mile wide corridor is forested with various sizes and species of trees, which, in conjunction with other vegetation, form a nearly continuous canopy. Concentrations of down trees are common.

2. Due to the unique nature of the drainage, as well as the potential for mineral exploration, development has been continuous. There are approximately 115 mining claims in the drainage. Recreation has become the predominant use, with approximately 250 private structures, many of which are seasonal residences, 25 permitted recreational residences on National Forest land, 4 church camps, 6 well used designated Forest Service campgrounds and numerous wilderness trailheads and dispersed camp sites.
3. The Gallatin Forest Plan specifies that the Main Boulder River is eligible for consideration and possible inclusion into the National Wild and Scenic Rivers System. Potential classifications for “scenic and recreational” considerations are as follows: Wilderness boundary to Bramble Creek (Scenic Classification), Bramble Creek to Miller Creek (Recreation Classification), Miller Creek to Blakely Creek (Scenic Classification), Blakely Creek to the Forest Boundary (Recreation Classification).
4. In Appendix J of the Gallatin Forest Plan, the Forest Service commits to maintaining and protecting the values for which river segments were initially identified as eligible for classification as a Wild and Scenic River (PL 90-542). Protection will continue until suitability studies are completed.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

5. A continuous forest canopy covers much of the canyon. Tree limbs and smaller trees combine to create continuous vegetation from the forest floor to the tops of the tallest trees. Near the canyon bottom, the forest floor is interrupted by four large meadows, some of which are associated with the church camps. One of the meadows is irrigated, resulting in a prolonged period of fresh, green growth. In the others, grasses tend to cure by mid-summer of an average year.
6. Access to all locations in the Boulder River Corridor is limited to a single county road. The road runs through the canyon bottom for approximately 24 miles ending at the wilderness boundary in the Monument Peak area. The Main Boulder Road is rough, unpaved, low-speed and single lane with several one-lane bridges crossing the river.
7. Forest Service plans call for logging and fuel reduction treatments on approximately 2500 acres in fifty-one separate units. A maximum of 7.4 miles of temporary roads will be built for conventional ground-based logging systems. Conifers will be slashed and prescribed burning activities will occur on approximately 400 acres of meadow type habitats.
8. The proposed fuels reduction treatments throughout the Main Boulder River will not maintain the forests in a near natural environment in those sections where scenic river qualities are supposed to be maintained. The FEIS at 3-24 notes that nearly all the Main Boulder Corridor is forested with densely-stocked, closed canopy stands of lodgepole pine, Douglas fir and subalpine fir-spruce. The proposed fuels treatments will result in a major reduction, generally over half or more of the current trees (see FEIS at 2-16). The FEIS at 3-62 notes that harvest will leave more open area and visible stumps; the character of the treated forest will be changed; areas will appear more open and will have significantly less vegetation cover. In addition, new

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

temporary roads will be evident for many years to come.

B. The Endangered Grizzly Bear

1. Grizzly bear (*Ursus arctos horribilis*) are large North American brown bears that “once numbered more than 50,000, and roamed the prairies, forests, shorelines, and foothills from the Great Plains to the California coast and south to Mexico.” Interagency Grizzly Bear Committee at <http://www.fs.fed.us/r1/wildlife/igbc/cwi/recovery.htm>. Grizzly bear habitat, as well as numbers, shrunk drastically as more Americans settled in the western United States. Today “only a few small corners of grizzly country remain [in the lower 48 states], supporting about 1,100 wild grizzly bears.” *FWS Grizzly Bear Recovery Overview and Update* at 1 (April 2000).

2. On July 28, 1975, Defendant FWS listed the grizzly bear as threatened under the Endangered Species Act, 16 U.S.C. §§ 1531-1544, throughout its range in the lower 48 states. 40 Fed.Reg. 145,31734 (July 28, 1975). In listing the bear, FWS stated that

Timbering practices and trail construction in areas where these bears still occur have resulted in the building of numerous access roads and trails into areas which were formerly inaccessible. This has resulted in making the bears more accessible to legal hunters, illegal poachers, human-bear conflicts, and livestock-bear conflicts.... In two of the three areas where grizzly bears still occur, the bears are isolated from other populations so that they cannot be reinforced, either genetically or by movement of individual bears.

Id.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

1. The FWS developed the revised the Grizzly Bear Recovery Plan (“Recovery Plan”) in 1993 with the goal of “identify[ing] actions necessary for the conservation and recovery of the grizzly bear.” *Recovery Plan* at 15. The plan identified seven grizzly bear ecosystems, or recovery zones, in which recovery is to be accomplished. *Id.* at ii. A recovery zone is defined as “the area in each grizzly bear ecosystem within which the population and habitat criteria for achievement of recovery will be measured.” *Id.* at 17.

2. According to the Recovery Plan, the “most crucial element in grizzly recovery is securing adequate effective habitat,” which is defined as “that which provides all the components necessary for the survival of the species.” *Id.* at 21. “Food, cover, denning habitat, solitude, and space are all important constituents of effective habitat.” *Id.* The Recovery Plan provides that:

Grizzly populations require some level of safety from human depredation and competitive use of habitat that includes roading, logging, mining, human settlement, grazing, and recreation... Roads probably pose the most imminent threat to grizzly habitat today. The management of roads is one of the most powerful tools available to balance the needs of people with the needs of bears.

Id. at 21-22.

1. Although the Recovery Plan is designed to ensure the recovery of grizzly bears within the recovery zones, there are no magic lines that these wide-ranging bears will not cross. An insular recovery zone by itself is not sufficient to maintain a sustainable grizzly population.

2. The Recovery Plan also recognizes the importance of linkage zones, which are “areas between currently separated populations that provide adequate habitat for low densities of individuals to exist and move

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

between two or more larger areas of suitable habitat.” *Id.* at 24. This movement between ecosystems is seen as a critical part of grizzly bear conservation. Such linkage zones “enhance the viability of populations that are separated by some distance by facilitating the exchange of individuals and maintaining the demographic vigor and genetic diversity.” *Id.* The Recovery Plan states that “preserving linkage between populations is a more legitimate long-term conservation strategy than are attempts to manage separate island populations.” *Id.* At this time, many intervening areas between existing recovery zones are largely interrupted by roads, agricultural lands and various developments such that they are “unlikely to be crossed by grizzly bears without the chance of confrontation with humans.” *Id.* One objective of the Recovery Plan is to assess linkage zones and to identify specific management measures needed to remove population and habitat limiting factors to promote sustainable populations of grizzlies. *Id.*

3. Grizzlies are harmed directly by human/bear contact and indirectly by habitat degradation resulting from human activities such as timber harvest. Roads associated with timber harvest and other activities create a major source of both direct and indirect impacts on grizzly bears. The FWS has determined that “[w]hen roads are located in important habitats, such as riparian zones, snowchutes, shrubfields or mature whitebark pine stands, habitat loss through avoidance behavior can be significant.” (FWS administrative Amendment to Biological Opinion on the Gallatin National Forest Plan, p. 8, January 31, 1995.)
4. In addition to the indirect effects of human development, grizzlies are harmed directly by human/bear contact. The central issue in ensuring viability of grizzly bear populations is minimizing negative human effects. Direct human-caused mortality is responsible for most grizzly bear population declines and extinctions. The Greater Yellowstone Ecosystem is estimated to contain approximately up to 400 of the 800-1000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

grizzly bears that remain in the lower 48 states. (2004 A-19 Biological Opinion) The Gallatin National Forest, situated to the immediate north and west of Yellowstone National Park, has long been recognized as important habitat for the greater Yellowstone grizzly bear population. The Interagency Grizzly Bear Committee has determined that the Gallatin National Forest contains 14% of all occupied grizzly bear habitat in the Greater Yellowstone Ecosystem. The Main Boulder area is one portion of the Gallatin National Forest that provides critical grizzly bear habitat.

5. In 1995 the FWS issued an amendment [hereinafter 1995 Biological Opinion] to the original Biological Opinion for the Gallatin National Forest Plan. This 1995 Biological Opinion set out the following prescriptions for protecting grizzly bear habitat on the Gallatin National Forest:
 6. No increase in open motorized access route density over current levels.
 7. No increase in total motorized access route density over current levels.
 8. No decrease in the amount of core (secure) area from the current level.
9. These criteria apply to the Forest Service’s decision to harvest timber in the Main Boulder area.
10. Pursuant to the Gallatin Forest Plan, “grizzly bear standards and guidelines will be followed in maintaining and improving habitat, minimizing human/grizzly bear conflict potential, and in guiding resource management activities.”

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

11. The Gallatin National Forest Plan contains substantive standards which, under the NFMA, provide legally binding criteria for which actions the Forest Service may and may not allow on the Gallatin. These standards are designed to protect the environmental integrity and character of the Forest. Under certain special circumstances, forest supervisors have the discretion to make temporary, site-specific amendments to forest plan standards in order to allow insignificant activities which would otherwise violate the forest plan. On the Gallatin National Forest, these site specific amendments are no longer an exception to the rule. Temporary, site-specific amendments to the Gallatin Forest Plan Standards are made routinely and as a matter of course almost every time a timber sale is offered on the Gallatin.
12. Gallatin Forest Plan Amendment 19 will be violated if the proposed project is implemented. As noted at 2-37 of the Main Boulder Fuels Reduction FEIS, Amendment 19 of the Gallatin Forest Plan requires there be no increase in open and total motorized access route density from the current level in grizzly bear recovery habitat (MS 1 and 2 areas). From 7 – 10 miles of new temporary roads will be constructed for the Main Boulder project, including some portions within recovery habitat, but no other road closures were implemented to maintain the current road densities in this area. The impact on open roads in the Main Boulder project area is summarized in the Biological Assessment at page 13. During the project, open road density will change from 2.4 to 10.1 miles. The total road density will increase from 45.7 to 53.4 miles (Fuel Reduction and Prescribed Fire Project, Biological Assessment for Terrestrial Wildfire Species, Table 4, A-37 – A-39).
13. The Main Boulder Project will result in a decrease of grizzly bear core habitat, in violation of Amendment 19.
14. The Main Boulder Project violates Amendment 19 and management direction for management area 15, or lands

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

where grizzly bear management is required.

15. Because of this violation, the Forest Service should have completed formal consultation with the FWS.

Instead, informal consultation was completed.

C. Northern Goshawk

1. The Forest Service program for the Main Boulder River does not ensure local viability of a management indicator species for Douglas-fir old growth, the northern goshawk, or the multiple species “indicated” by the goshawk.
2. The Northern Goshawk is both a sensitive and management indicator species that is dependent upon mature and old-growth Douglas-fir and lodgepole pine forests to support nesting success. One of the most important limiting factors identified in Forest Service science (e.g., *Reynolds* 1992) for breeding success of northern goshawks is the abundance of primary prey species like the snowshoe hare and red squirrel.
3. The Forest Service has failed to support conclusions of project impacts on the goshawks with any data or analysis; true impacts of the project on this management indicator and sensitive species have not been disclosed as a result; significant impacts on local goshawk populations are in fact likely and will affect local persistence of this species.
4. At least 200 acres of old growth Douglas fir, or high quality goshawk nesting habitat, will be logged in the Main Boulder project (FEIS E-59).
5. The agency claims that most of the suitable goshawk habitat in the Main Boulder area is located up in an adjacent wilderness area (FEIS E-9, 3-81). Because no valid analysis was done on goshawk nesting habitat availability in the entire analysis area there is no valid basis for this claim.
6. It is likely that much of the suitable goshawk nesting habitat on this landscape will be impacted by the Main Boulder Fuels Project. The best goshawk nesting habitat occurs in Units 14 through 32, which represents 60% of the proposed units (FEIS at E-9). The actual amount of suitable goshawk habitat that will remain is unknown, as the Forest Service never provided this information. Without this information, it is

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

impossible to define the amount of goshawk nesting habitat that will be lost and fragmented.

7. Forest Service claims that no nesting goshawks occur in the Main Boulder project area were never supported by adequate survey data. The agency claims that no goshawks are known to nest or forage in the Main Boulder Project Area, even though the FEIS at D-13 states that the upper portions of the Main Boulder area have been estimated to have a high potential for goshawk nesting.

D. Canada Lynx

1. The lack of travel corridors in the Main Boulder Project for a 24-mile stretch of the corridor will impede movements and habitat use of adjacent wilderness areas by the threatened lynx.

E. Wolverines

1. Wolverines are classified as a “sensitive species” on the Gallatin Forest (FEIS D-1,2). Wolverine are likely to occur at higher elevations in the Absaroka-Beartooth Wilderness (FEIS 3-84). The Main Boulder Project Area provides big game winter range at the lower elevations (FEIS 2-35), and carrion on these winter ranges could be used by wolverine (FEIS 3-85). The Region One interim guidelines for wolverine notes that in winter months they can be found at low elevation along streams and associated with large ungulate concentrations such as found on winter ranges; areas with abundant ungulate populations and low road densities provide good wolverine habitat (Forest Service 1992) (provided at D-8 of Plaintiff NEC’s 9/22/05 appeal). The lack of travel corridors in the Main Boulder Project for a 24-mile stretch of the corridor will impede movements and habitat use of adjacent wilderness areas by the wolverine.

IV. LEGAL CLAIMS

Count 1 NEPA Claims

1
2
3
4
5
6
7
8
9
10
11
12
13
14

1. NEPA, 42 U.S.C. §§ 4321 et seq., is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. NEPA is designed to ensure that the potential environmental consequences of proposed federal actions are carefully and objectively evaluated. 42 U.S.C. § 4332; 40 C.F.R. § 1501. NEPA also ensures that the information upon which such evaluations are based is available to public officials and citizens before decisions are made and before actions are taken. 40 C.F.R. § 1500.1(b)-(c).
2. To accomplish these purposes, NEPA requires federal agencies to prepare a “detailed statement” regarding all “major federal actions significantly affecting the quality of the human environment. . .” 42 U.S.C. § 4332(C). This statement is known as an environmental impact statement (EIS).
3. Plaintiffs’ NEPA claims in this case are cognizable under the Administrative Procedure Act (APA) which prohibits administrative action that is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law. 5 U.S.C. § 706.
4. Each and every allegation set forth in this Complaint is incorporated herein by reference.
5. NEPA requires all agencies to “rigorously explore and objectively evaluate all reasonable alternatives...” Consideration of alternatives that lead to similar results is not sufficient to meet the intent of NEPA. California v. Block, 690 F.2d 753 (9th Cir. 1982). The Forest Service cannot meet this legal standard because all of the action alternatives require violations of the current Gallatin Forest Plan. Moreover, the Forest Service arbitrarily rejected the recommendations of its own expert regarding effective fuel treatment alternatives.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

6. The Forest Service failed to take the hard look required by NEPA, and otherwise acted in an unlawful, arbitrary and capricious manner when deciding herbicide use on the project. Despite public comment during the administrative process, the Forest Service has failed to analyze the negative impacts of herbicide use. The FEIS failed to state which herbicides will be used, in what amounts, in what manner, or how far from the target weeds the formulation will be released – inches or hundreds of yards (not counting drift) – or potential impacts of herbicides on the drinking water for humans in the camps and cabins in the drainage, in violation of NEPA.
7. The Forest Service has failed to look at the cumulative impacts of management activities on wildlife, fish, and weeds within and adjacent to the Main Boulder Corridor. The FEIS notes that repeated fuel treatments will be required to maintain the reduced fuel levels that will be achieved with the Main Boulder Fuels Project. The cumulative impact of maintaining an artificial forest condition in the Main Boulder Corridor with repeated fuels treatments was never evaluated in the FEIS, the impact on fuels management on adjacent private lands was not evaluated in the FEIS, and the FEIS failed to address the cumulative impacts of weeds from various disturbance projects the Big Timber Ranger District will be responsible for in the future, all in violation of NEPA.

Count 2 NFMA Claims

1. Each and every allegation set forth in this Complaint is incorporated herein by reference.
2. Under the National Forest Management Act, 16 U.S.C. §§ 1600 et seq., the Forest Service is required to develop long-range management plans (forest plans) for each national forest in accordance with the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

standards, criteria and goals set out in the Act. These forest plans are the preeminent planning documents for each national forest. Pursuant to NFMA, the Forest Service must demonstrate that site-specific projects on national forests, such as timber sales, are consistent with the applicable forest plans. 16 U.S.C. § 1640(i); 36 C.F.R. 219.10(e).

3. Plaintiffs' NFMA claims in this case are cognizable under the Administrative Procedure Act, which prohibits administrative action that is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law. 5 U.S.C. § 706.
4. Neither the Forest Plan standard for riparian habitat nor the standard for prescribed stocking densities to maintain wildlife hiding cover and to provide rapid growth of trees for wildlife thermal cover will be met in the Main Boulder project, in violation of NFMA.
5. The Forest Service has failed to follow Forest Plan direction that requires management situation lines for the grizzly bear to be updated during project planning, including for the Main Boulder project, in violation of NFMA. Such updating is essential to ensure that adequate habitat is managed for grizzly bears to ensure a viable population is achieved.
6. The Forest Service has failed to ensure viability of sensitive, vulnerable wildlife, including grizzly bear, lynx and wolverine that occupy this landscape through the provision of critical biological corridors connected vast expanses of wilderness adjacent to the Main Boulder project, in violation of NFMA.
7. Pursuant to the Gallatin Forest Plan, the Forest Service must select silvicultural treatments that benefit grizzly bears in Situation 1 grizzly bear habitat. The Forest Service has failed to adhere to Gallatin Plan management directives developed to maintain grizzly bear habitat. The Forest Service has not shown that

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

the logging and roading planned for the Main Boulder project will benefit grizzly bears, in violation of NFMA.

- 8. GFsp
- 9. O, , ts
- 10. FaNaFo’ a rhA
- 11. T TGaNaFo ho.t
- 12. P s GFtrS Tf
- 13. T,.

Count 3 ESA Claims

- 1. Each and every allegation set forth in this Complaint is incorporated herein by reference.
- 2. The purpose of the ESA is to provide a means to conserve the ecosystems upon which threatened and endangered species depend. 16 U.S.C. § 1531(b).
- 3. The ESA establishes a mandate that all federal departments and agencies shall seek to conserve species of fish, wildlife, and plants that are in danger of or threatened with extinction. 16 U.S.C. §§ 1531(a)(1) and 1531(c)(1).
- 4. Section 9 of the ESA generally prohibits taking of endangered wildlife. 16 U.S.C. § 1538.
- 5. Definition of “taking” includes: “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).
- 6. Harass is an “intentional or negligent act or omission which creates the likelihood of injury to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.

7. Harm is an act that “actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.
8. The Secretary shall review administered programs in the furtherance of the ESA purpose. All federal agencies, in consultation with and with the assistance of the Secretary, shall carry out programs for the conservation of endangered and threatened species. 16 U.S.C. § 1536(a)(1).
9. Section 7 of the ESA imposes a non-discretionary duty on federal agencies to undertake consultation with the Secretary prior to taking any action that “may affect listed species or critical habitat.” 50 C.F.R. § 402.14 (implementing 16 U.S.C. § 1536(a)(2)). The term “Secretary” means the Secretary of the Interior or the Secretary of Commerce, and in certain cases involving the importation or exportation of terrestrial plants, the Secretary of Agriculture. 16 U.S.C. § 1532(15).
10. If the Secretary informs an agency that a listed species or species proposed for listing may be present in an area affected by the agency’s action, the agency must perform a “biological assessment” to determine whether such threatened or endangered species are likely to be affected. 16 U.S.C. § 1536(c).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

11. If the biological assessment indicates that the action is not likely to adversely affect a species, the Forest Service may fulfill its consultation requirements under the ESA by asking the FWS to review the biological assessment and issue a letter concurring or disagreeing with the conclusions therein. The Act requires agency consultation to “use the best scientific and commercial data available” in assessing the potential effects of a proposed action. 16 U.S.C. § 1536(a)(2).
12. If a biological assessment indicates that an action is likely to jeopardize or adversely affect a species, the FWS must render a biological opinion. A biological opinion includes suggested “reasonable and prudent alternatives” that would not violate Section 7(a)(2). 16 U.S.C. § 1536(b).
13. The Secretary shall implement plans for the conservation and the survival of endangered and threatened species, and to the “extent practicable,” incorporate in each plan a “description of such site-specific management actions as may be necessary for the conservation and survival of the species.” 16 U.S.C. § 1536 (f)(1)(B)(i)
14. An incidental take statement is often incorporated in a biological opinion. Such a statement authorizes an incidental take, based upon a FWS determination that the take will not jeopardize the existence of an affected species.
15. The FWS and Forest Service are required to use the “best scientific and commercial data available” in assessing potential effects of an action on threatened and endangered species. In violation of 16 U.S.C. § 1536(a)(2), the agencies failed to consider available and relevant data in their assessment of potential impacts on the grizzly bear. Specifically, the agencies failed to acknowledge the presence of sows with cubs in the Main Boulder drainage and failed to acknowledge the scientific research regarding the reluctance of grizzly bears

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

to cross roads in the absence of cover.

16. The biological opinion does not insure that the potential effects of the agency action “is not likely to jeopardize the continued existence” of the grizzly bear. This is a violation of 16 U.S.C. § 1536(a)(2).
17. The analysis performed in the Biological Assessment does not allow the Forest Service to quantify or evaluate the effects of the Main Boulder Project on grizzly bears. The FWS concurrence with the Forest Service’s determination of “not likely to adversely affect” was based upon inadequate analysis. Failure to insure that grizzly bears will not be adversely impacted by the project is in violation of 16 U.S.C. § 1536(a)(2).
18. Road improvements, logging activity, and increased firewood activities associated with logging will temporarily increase general public use in this area. Increased use will be a detriment to the grizzly bear and a violation of 16 U.S.C. § 1536(a)(2).
19. The 1995 biological opinion was written to ensure that grizzly bears are not adversely affected by motorized travel and habitat degradation. The Main Boulder timber sale will result in an increase of motorized access density in key grizzly bear habitat. This is in violation of 16 U.S.C. § 1536(a)(2).
20. The Forest Service determined it would not likely adversely affect the threatened grizzly bear or the threatened Canada lynx (ROD 36). Because Amendment 19 and Management Area 15 directives will be violated with the Main Boulder project, the Forest Service should have completed formal consultation with the FWS instead of informal consultation. The Forest Service has violated Section 7 of the ESA by failing to undertake formal consultation with the Secretary of the Interior prior to taking any action which may affect listed species or critical habitat [50 CFR. Section 402 Implementing 16 U.S.C. Section 1536 (a)(2)] within the Main Boulder Project Area and by failing to disclose and seek formal consultation with the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

FWS regarding adverse fragmentation impacts the Main Boulder Project will have on surrounding wilderness habitat currently occupied by the threatened grizzly bear and threatened Canada lynx.

WHEREFORE, Plaintiffs request this Court:

1. Issue a declaratory judgment that the Defendants' actions described are unlawful and in violation of the NEPA, NFMA, ESA, APA and their implementing regulations;
2. Preliminarily and permanently enjoin the Forest Service from implementing the Main Boulder Project in any way until such time as the requirements of the NFMA, NEPA, ESA, APA and their implementing regulations have been fully complied with;
3. Award Plaintiffs their costs, expenses, expert witness fees and attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, or any other applicable state or federal law; and
4. Grant Plaintiffs such further relief as may be appropriate.

Dated April 24, 2006.

Timothy M. Bechtold
Rossbach Hart Bechtold, P.C.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

Attorneys for Plaintiffs

By: /s/ Timothy M. Bechtold
Timothy M. Bechtold