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

17 ALLIANCE FOR THE WILD  
18 ROCKIES

19 Plaintiff,

20 vs.

Case Number \_\_\_\_\_

21 LESLIE WELDON, Regional Forester  
22 of Region One of the U.S. Forest  
23 Service, and UNITED STATES  
24 FOREST SERVICE, an agency of the  
25 U.S. Department of Agriculture,  
26 Defendants.

**COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF**

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## I. INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act. Plaintiff challenges the U.S. Forest Service’s 2008 management plan and 2011 annual decision to permit recurring, low-altitude helicopter flights that harass Yellowstone grizzly bears, during spring and summer bear season, over National Forest lands in the Yellowstone Grizzly Bear Recovery Zone. The Yellowstone grizzly bear is listed as a threatened species under the Endangered Species Act. Plaintiff also challenges the adequacy of the Gallatin National Forest Land and Resource Management Plan (Forest Plan) as it relates to the agency’s decisions to allow helicopter harassment of threatened Yellowstone grizzly bears in occupied spring and summer grizzly bear habitat.
2. Plaintiff Alliance for the Wild Rockies attests that the agency’s decisions permitting recurrent, low-altitude helicopter use for wildlife-hazing operations on National Forest lands within the Hebgen Basin in the Yellowstone Grizzly Bear Recovery Zone, as well as the Forest Plan that fails to predict, address, or analyze the environmental impacts of those decisions, are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.

1 3. Defendants' approvals of recurrent, low-altitude helicopter hazing  
2 operations over National Forest lands, and their failure to analyze the  
3 environmental impacts of those operations on threatened Yellowstone  
4 grizzly bears, violate the National Environmental Policy Act (NEPA), 42  
5 U.S.C. 4331 *et seq.*, the National Forest Management Act (NFMA), 16  
6 U.S.C. § 1600 *et seq.*, and the Administrative Procedure Act (APA), 5  
7 U.S.C. §§ 701 *et seq.*

8 4. Defendants' approvals of recurrent, low-altitude helicopter hazing  
9 operations over National Forest lands, and their failure to analyze the  
10 environmental impacts of those operations on threatened Yellowstone  
11 grizzly bears also violate the Endangered Species Act, 16 U.S.C. §§ 1531 *et*  
12 *seq.* On May 11, 2011 Plaintiff sent a 60 Day Notice of Intent To Sue under  
13 the Endangered Species Act to Defendants. This Court will have  
14 jurisdiction over Plaintiffs' ESA claims on July 11, 2011, 16 U.S.C. §  
15 1640(g)(2), at which time Plaintiff will formally amend its complaint to add  
16 those claims in the Claims for Relief.

17 5. Plaintiff requests that the Court set aside or remand the challenged decisions  
18 pursuant to 5 U.S.C. § 706(2)(A) and 16 U.S.C. § 1540(g), and that the  
19 Court enjoin the agency and its contractors/permittees from executing low-  
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1 altitude, recurrent helicopter hazing operations over National Forest lands in  
2 the Yellowstone Grizzly Bear Recovery Zone.

- 3  
4 6. Plaintiff seeks a declaratory judgment, injunctive relief, the award of costs  
5 and expenses of suit, including attorney and expert witness fees pursuant to  
6 the Equal Access to Justice Act, 28 U.S.C. § 2412, and such other relief as  
7 this Court deems just and proper.  
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10 **II. JURISDICTION**

- 11 7. This action arises under the laws of the United States and involves the  
12 United States as a Defendant. Therefore, this Court has subject matter  
13 jurisdiction over the claims specified in this Complaint pursuant to 28  
14 U.S.C. §§ 1331, 1346.  
15

- 16 8. An actual controversy exists between Plaintiff and Defendants. Plaintiff's  
17 members use and enjoy the Gallatin National Forest for hiking, fishing,  
18 hunting, camping, photographing scenery and wildlife, and engaging in  
19 other vocational, scientific, spiritual, and recreational activities. Plaintiff's  
20 members intend to continue to use and enjoy the area frequently and on an  
21 ongoing basis in the future.  
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25 9. The aesthetic, recreational, scientific, spiritual, and educational interests of  
26 Plaintiff's members have been and will be adversely affected and  
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1 irreparably injured if Defendants continue to allow activities that harass  
2 threatened Yellowstone grizzly bears on the Gallatin National Forest  
3 without ever adequately acknowledging and assessing the impact of these  
4 activities. These are actual, concrete injuries caused by Defendants' failure  
5 to comply with mandatory duties under NFMA, NEPA, and the APA. The  
6 requested relief would redress these injuries and this Court has the authority  
7 to grant Plaintiffs' requested relief under 28 U.S.C. §§ 2201 & 2202, and 5  
8 U.S.C. §§ 705 & 706.

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12 10. Defendants have not conducted a NEPA analysis of the impacts on  
13 threatened Yellowstone grizzly bears from the helicopter hazing operations  
14 in the Hebgen Basin that it plans to allow annually starting around May 15.  
15 The final decisions disclosing and approving the challenged activity were  
16 the 2008 management plan and 2011 annual plan. Neither plan was  
17 accompanied by a NEPA analysis, nor was there any previous NEPA  
18 analysis disclosing and analyzing the impacts of May and June helicopter  
19 hazing on grizzly bears that these plans could "tier to" to avoid their own  
20 NEPA analysis. Thus, the agency has not offered any administrative  
21 remedy to exhaust in this matter, and therefore the challenged decisions are  
22 final and subject to this Court's review under the APA, 5 U.S.C. §§ 702,  
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1 704, and 706.

2  
3 **III. VENUE**

4 11. Venue in this case is proper under 28 U.S.C. § 1391(e) and LR 3.3(a)(1).  
5 Defendant Weldon is the chief representative for Defendant U.S. Forest  
6 Service within the District of Montana, and she resides within the Missoula  
7 Division of the United States District Court for the District of Montana.  
8

9  
10 **IV. PARTIES**

11 12. Plaintiff ALLIANCE FOR THE WILD ROCKIES is a tax-exempt, non-  
12 profit public interest organization dedicated to the protection and  
13 preservation of the native biodiversity of the Northern Rockies Bioregion,  
14 its native plant, fish, and animal life, and its naturally functioning  
15 ecosystems. Its registered office is located in Helena, Montana. The  
16 Alliance has over 2,000 individual members and more than 600 member  
17 businesses and organizations, many of which are located in Montana.  
18 Members of the Alliance work as fishing guides, outfitters, and researchers,  
19 who observe, enjoy, and appreciate Montana's native wildlife, water quality,  
20 and terrestrial habitat quality, and expect to continue to do so in the future,  
21 including in the Hebgen Basin of the Gallatin National Forest. Alliance's  
22 members' professional and recreational activities are directly affected by  
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1 Defendants' failure to perform their lawful duty to protect and conserve  
2 threatened Yellowstone grizzly bears by approving the challenged recurrent,  
3 low-altitude helicopter hazing operations. Alliance for the Wild Rockies  
4 brings this action on its own behalf and on behalf of its adversely affected  
5 members.  
6

7  
8 13. Defendant LESLIE WELDON is the Regional Forester for the Northern  
9 Region of the U.S. Forest Service, and in that capacity is charged with  
10 ultimate responsibility for ensuring that decisions made at each National  
11 Forest in the Northern Region and within the District of Montana, including  
12 the Gallatin National Forest, are consistent with applicable laws,  
13 regulations, and official policies and procedures.  
14

15  
16 14. Defendant UNITED STATES FOREST SERVICE (Forest Service) is an  
17 administrative agency within the U.S. Department of Agriculture, and is  
18 responsible for the lawful management of our National Forests, including  
19 the management of threatened Yellowstone grizzly bear habitat within the  
20 Gallatin National Forest.  
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## 23 **V. FACTUAL ALLEGATIONS**

### 24 Yellowstone grizzly bear

25  
26 15. The Yellowstone grizzly bear is a sub-population of grizzly bear that is  
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1 currently listed under the ESA.

2  
3 16. Grizzly bears, icons of the American frontier, historically numbered  
4 between 50,000-100,000 and ranged throughout the western United States.

5  
6 17. With European settlement, grizzlies were “shot, poisoned, and trapped  
7 wherever they were found.”

8  
9 18. Human settlement and resource extraction pervaded the American West and  
10 displaced bears across the landscape. In a historical blink of an eye – from  
11 1850-1950 – humans reduced bear numbers and habitat by 98-99% and  
12 restricted their range to a few remnant islands of wild country, including the  
13 Greater Yellowstone Ecosystem.

14  
15 19. When the grizzly bear was originally listed under the Endangered Species  
16 Act (ESA) in 1975, perhaps 1,000 individuals remained.

17  
18 20. The number of breeding Yellowstone grizzly bears has been estimated at  
19 slightly over 100 individuals.

20  
21 21. The best available science indicates that hundreds of breeding individuals  
22 are necessary to prevent extinction from inbreeding.

23  
24 22. The U.S. Fish and Wildlife Service recognizes the threat of inbreeding  
25 depression and states that the population of the Yellowstone grizzly bear is  
26 "lower than recommended for evolutionary success ...."



1 23. On March 29,2007, the Yellowstone grizzly bear was delisted by the U.S.  
2 Fish and Wildlife Service as a “distinct population segment” of grizzly bear.  
3

4 24. On September 21, 2009, this Court overturned the Yellowstone grizzly bear  
5 delisting rule for failing to comply with the provisions of the Endangered  
6 Species Act. *Greater Yellowstone Coalition v. Servheen*, 672 F. Supp.2d  
7 1105 (D. Mont. 2009).  
8

9 25. The Yellowstone grizzly bear is thus still listed as threatened under the  
10 Endangered Species Act. *See* 75 Fed. Reg. 14496 (March 26, 2010) (stating  
11 that “all grizzly bears in the lower 48 States are again listed as threatened”).  
12  
13

14 Effects of helicopters on grizzly bears

15 26. The grizzly bear’s unique biology exacerbated the speed and depth of its  
16 decline and slows recovery efforts. Grizzly bears mature late and, on  
17 average in the Greater Yellowstone Ecosystem, produce small litters of two  
18 bears. The bears have one of the slowest reproductive rates of all terrestrial  
19 mammals, and it takes up to 10 years for a female to replace herself.  
20  
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22 27. Young bears have overlapping home ranges with their mother’s, making  
23 dispersal across the landscape a slow process. Adults, especially males,  
24 require vast home ranges.  
25

26 28. Yellowstone grizzlies depend on four primary food sources - ungulate meat,  
27

1 whitebark pine seeds, cutthroat trout, and army cutworm moths - all of  
2 which face continued, onerous threats.

3  
4 29. When bears emerge from their dens in the spring, they are malnourished  
5 from their long winter denning periods, which are essentially five to six  
6 month long fasting periods. The bears heavily depend on their opportunity  
7 to consume winter-killed ungulates to nourish themselves and their cubs  
8 after den emergence. One study found that the most likely time for a grizzly  
9 bear to die of natural causes is during this spring period. Accordingly,  
10 disruption of grizzly bears during spring feeding activities can have  
11 significant detrimental effects on grizzly bears: the Grizzly Bear Recovery  
12 Plan states, “Grizzly bears must avail themselves of foods rich in protein or  
13 carbohydrates in excess of maintenance requirements in order to survive . . .  
14 post-denning periods.”

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19 30. Mechanized activities displace bears from their habitat, which stresses them  
20 biologically and increases the risk of displacement onto private lands and  
21 other non-preferred habitat where chances for mortality increase due to  
22 increased risks of human-bear encounters.

23  
24  
25 31. One type of motorized use that negatively affects grizzly bears are low-  
26 altitude helicopter over-flights. According to a National Park Service  
27

1 literature review of five different studies, helicopters cause grizzly bears to  
2 panic and flee “in nearly all cases.”  
3

4 32. Grizzly bears never become tolerant of helicopters, even with frequent  
5 exposure.  
6

7 33. Grizzlies may abandon areas in response to even infrequent overflights, and  
8 the consequences of habitat abandonment can be serious, particularly for  
9 species whose high-quality habitat is already scarce.  
10

11 34. The Forest Service’s own guidance document on determining how  
12 helicopters affect grizzly bears states:  
13

14 Any human activities that would result in displacement  
15 or disturbance to bears sufficient to produce any of the  
16 results listed above [fleeing, physiological changes,  
17 increased heart rate, displacement to lower quality  
18 habitat, and increased energetic demands] should be  
19 considered a negative effect for the purposes of effects  
20 analysis in a Biological Assessment. Helicopter use  
21 clearly has the potential to produce these negative  
22 effects. Unless an extenuating circumstance exists,  
23 therefore, the appropriate effects determination for low  
24 altitude and high frequency *or* extended duration  
25 helicopter use is “may affect, likely to adversely affect.”  
26

27 35. Accordingly, multiple court decisions from this Court have  
28 consistently set aside, as arbitrary, Forest Service authorizations of  
recurring, low-altitude helicopter use in ESA-listed grizzly bear

1 habitat. *Alliance for the Wild Rockies v. U.S. Forest Service*, CV-07-  
2 150-M-DWM, Order at 19-26 (D. Mont. July 30, 2008); *Alliance for*  
3 *the Wild Rockies v. Tidwell*, CV-08-168-M-JCL-DWM, Findings and  
4 Recommendations of United States Magistrate Judge at 16-23 (Dec.  
5 23, 2009), *adopted in full by Alliance for the Wild Rockies v. Tidwell*,  
6 CV-08-168-M-JCL-DWM, Order at 2 (March 30, 2010); *Alliance for*  
7 *the Wild Rockies v. Bradford*, 720 F.Supp.2d 1193, 1213-1215 (D.  
8 Mont. June 29, 2010). The Forest Service has chosen not to litigate  
9 an appeal of any of these rulings.  
10  
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#### 13 1987 Gallatin Forest Plan

- 14
- 15 36. When the Yellowstone grizzly bear was temporarily delisted, the Forest  
16 Service implemented a Forest Plan amendment in six National Forests,  
17 including the Gallatin National Forest, to change grizzly bear habitat  
18 management standards on those National Forests.  
19
- 20 37. The Forest Plan amendment that changed the grizzly bear habitat  
21 management standards on the Gallatin National Forest is no longer in effect;  
22 instead the rules in effect prior to delisting are once again in effect. The  
23 NEPA analysis from the amendment predicted this possibility and, prior to  
24 the formal delisting, stated: “This forest plan amendment will be  
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1 implemented no sooner than five (5) working days after the Final Rule  
2 delisting the Yellowstone grizzly population has been published in the  
3 Federal Register. If the grizzly bear is not delisted, existing forest plan  
4 direction for grizzly bears will remain in place. . . Should the delisting of the  
5 grizzly bear be overturned, existing forest plan direction for grizzly bears  
6 would remain in place.”  
7

8  
9 38. Accordingly, the following provisions from the Gallatin Forest Plan  
10 currently apply to Yellowstone grizzly bears on the Gallatin National  
11 Forest:  
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13  
14 A. “To assure the viability of the Yellowstone grizzly bear population  
15 and its habitats, Forest activities must be at a level and conducted in a  
16 manner to assure that [] *bears are not adversely impacted* directly,  
17 indirectly, or cumulatively . . . and [] that *sufficient area is left*  
18 *undisturbed from detrimental human activities to meet the biological*  
19 *requirements of grizzly bears.”* (emphasis added).  
20  
21

22 B. “The Yellowstone Grizzly Bear Guidelines in Appendix G of the Plan  
23 are intended to be an extension of the Forest-wide Standards, and are  
24 intended to be applied in all management areas in occupied habitat,  
25 whether referred to or not in the management standards.” In part, the  
26  
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1 Yellowstone Grizzly Bear Guidelines state “*design and implement*  
2 *project modifications which will provide compatibility (see Glossary)*  
3 *between grizzly bears and other resource management activities*  
4 *without jeopardizing the grizzly population. If a project cannot be*  
5 *made compatible, and it will jeopardize the grizzly populations, it will*  
6 *be necessary to eliminate the project if in MS-1 and/or modify the*  
7 *project if in MS-2, primarily to reduce the potential for bear/human*  
8 *conflict.” The guidelines further state: “Initiate formal consultation*  
9 *procedures with the Service, as necessary, if the biological review*  
10 *results in a ’May Effect’ [sic] determination.” (emphases added).*

- 11 C. “All persons issued permits, contracts, leases or other forms of  
12 authorization to conduct activities in occupied grizzly bear habitat are  
13 to receive an appropriately addressed and signed copy of Enclosure  
14 5.”

15 Enclosure 5 states:

16 Dear (Permittee, Contractor, Leasee. etc):

17 The area encompassed in your (permit/contract/lease) is within  
18 occupied grizzly bear habitat. The grizzly bear is classified as  
19 threatened under the Endangered Species Act. Human/bear  
20 conflicts have been, and continue to be, the major factor  
21 preventing recovery of grizzly bear populations. Therefore,  
22 activities authorized by your (permit/contract/lease) *must be*

1 *conducted in a manner which will prevent or minimize the*  
2 *opportunity for conflicts with the grizzly bear. Violations of*  
3 *(permit/contract/lease) clauses dealing with prevention of*  
4 *human/bear conflicts, intentional or negligent acts which result*  
5 *in the injury or death of a grizzly bear, or other violations of the*  
6 *Endangered Species Act can result in the termination of your*  
7 *(permit/contract/lease).*

8 The Forest Service, as a Federal Agency, is mandated to  
9 conduct its management activities in a manner to promote  
10 recovery of all endangered and threatened species. We ask for  
11 your help in bringing about the recovery of the grizzly bear.  
12 Should you have any questions or concerns regarding grizzly  
13 bear management and your activities. please contact (District  
14 Ranger).

15 Forest Supervisor/District Ranger.

16 (emphases added).

17 D. Forest Plan goals include: “Provide habitat for viable populations of  
18 all indigenous wildlife species . . . . Provide sufficient habitat for  
19 recovered populations of threatened and endangered species (i.e.  
20 grizzly bear . . . ). . . Strive to prevent any human-caused grizzly bear  
21 losses.”

22 E. Forest Plan Desired Future Conditions include: “Management  
23 practices provided in the Forest Plan are designed to favor the  
24 recovery of the threatened grizzly bear and endangered bald eagle. It  
25 may be necessary to restrict human activity within occupied grizzly  
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1 bear habitat to reduce human/grizzly bear confrontations.”

2  
3 39. The Gallatin Forest Plan does not disclose, address, or analyze the impacts  
4 of recurrent, low-altitude helicopter operations on Yellowstone grizzly  
5 bears.

6  
7 2000 Interagency Bison Management Plan

8 40. The Yellowstone grizzly bear shares habitat on National Forest lands with  
9 Yellowstone bison.

10  
11 41. Yellowstone bison are managed, in part, according to a 2000 interagency  
12 document called the Interagency Bison Management Plan, hereinafter  
13 referred to as the “2000 management plan.”

14  
15 42. As one of the partners to the interagency agreement, the Forest Service  
16 signed and authorized implementation of the 2000 management plan on  
17 National Forest lands.

18  
19 43. Although the Gallatin Forest Plan was not formally amended with the 2000  
20 management plan, the 2000 management plan did undergo NEPA analysis.

21  
22 44. In part, the 2000 management plan EIS/ROD disclosed that the agencies  
23 would execute hazing operations that would haze bison off of the Gallatin  
24 National Forest and into Yellowstone National Park.

25  
26 45. The 2000 management plan EIS/ROD and Biological Assessment  
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1 concluded that threatened Yellowstone grizzly bears would not be adversely  
2 affected by this hazing activity because the bears would most likely be in  
3 their dens during the hazing periods: “Bison management activities such as  
4 hazing . . . would not have more than a negligible impact on grizzly bears.  
5

6 Although there is the possibility of overlap in the fall and spring when bears  
7 are not in dens, during the majority of bison management activities, bears  
8 would be in their dens.”  
9

10  
11 46. The 2000 management plan EIS/ROD further elaborated by stating that  
12 there was no evidence of Yellowstone grizzly bears being present on  
13 National Forest lands on the west side of Yellowstone National Park (near  
14 West Yellowstone, Montana) at the time then planned for bison hazing  
15 operations: “At this time, no grizzly bears or their sign have been observed  
16 prior to hazing operations at West Yellowstone (USFS, Inman, pers.  
17 comm.)”  
18

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21 47. The 2000 management plan EIS/ROD promised that if grizzly bears were  
22 indeed present in the future, the agencies would not engage in bison hazing  
23 operations: “Currently, hazing operations would cease if there was evidence  
24 of grizzlies being active in the area.”  
25

26 48. In response to a public comment that “helicopters would adversely affect  
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1 denning bears and pregnant females and bears emerging from hibernation”  
2 the agencies reiterated that bears would likely be in their dens and/or at  
3 higher elevations during hazing operations: “[t]he actual practice of hazing  
4 bison is unlikely to affect bears emerging from their dens....Grizzly bears  
5 locate their dens at high elevations . . . .Winter range for bison, which  
6 encompasses the capture facilities and areas where hazing would occur, is  
7 present at lower elevations. Thus, the bears’ dens and the areas where  
8 hazing would occur do not overlap. . . . personnel conducting hazing  
9 activities move bison only within their winter range and not out in the more  
10 remote areas of the park where bears hibernate. Thus, hazing would not  
11 affect bears within their dens.”

16 49. In response to a similar public comment, the agencies asserted that “grizzly  
17 bear activity in the vicinity of the capture facilities is limited or nonexistent.  
18 Most human activities associated with the capture facilities would occur  
19 when grizzly bears are hibernating, although some operations may occur in  
20 November and April, when bears are active. However, because little or no  
21 grizzly activity occurs in these areas, impacts would be negligible.”

25 50. In contrast to the representation in the 2000 management plan EIS/ROD that  
26 hazing operations would end in April each year, the agency has instead been  
27

1 conducting hazing operations through May and June annually since 2008.

2  
3 51. Thus, in contrast to the finding in the 2000 management plan EIS/ROD that  
4 “no grizzly bears or their sign have been observed prior to hazing operations  
5 at West Yellowstone,” over the past several years there have been numerous  
6 observations of significant amounts of grizzly bear activity prior to and  
7 during hazing operations around West Yellowstone.

8  
9 52. For example, this year the Forest Service issued a joint press release on May  
10 13, 2011 stating that “Bears are out and active this time of year in the  
11 Greater Yellowstone area, including the Gallatin National Forest . . . . This  
12 time of year, bears have emerged from their dens and are feeding primarily  
13 on ungulate carcasses and early spring green-up. . . . Numerous sightings of  
14 bears feeding on carcasses have already occurred in the Cooke City area, *on*  
15 *the Horse Butte Peninsula just north of West Yellowstone, Montana,* and  
16 throughout Yellowstone National Park.” (emphasis added).

17  
18  
19  
20 53. Additionally, on May 12, 2011, the Forest Service posted a warning sign on  
21 the Madison Arm road near West Yellowstone, Montana that stated that  
22 there is a grizzly bear sow with an injured cub in the vicinity.

23  
24  
25 54. In direct violation of the agencies’ promise to the public in the 2000  
26 management plan EIS that “[c]urrently, hazing operations would cease if  
27

1 there was evidence of grizzlies being active in the area,” the agencies have  
2 recently announced plans to commence helicopter hazing operations on or  
3 around May 23, 2011 despite the undisputed evidence from their own press  
4 release and posted public warning signs that grizzly bears are present in the  
5 area.  
6  
7

8 55. Additionally, last year, on May 12, 2010, during helicopter hazing  
9 operations near West Yellowstone, a videographer filmed an incident in  
10 which a helicopter that was hazing bison in the area flew over a threatened  
11 Yellowstone grizzly bear and caused the bear to flee.  
12

13  
14 56. Thus, the EIS/ROD for the 2000 management plan represented that all  
15 hazing operations would end in April when bears were still at higher  
16 elevations or in their dens and that there would therefore be “little or no  
17 grizzly activity” in the area during hazing operations. Nowhere in the  
18 EIS/ROD did the agencies address the possibility – that has now  
19 materialized – wherein helicopter hazing of bison would routinely be carried  
20 out in May and June at a time that undisputedly overlaps with spring and  
21 summer grizzly bear activity in lower elevations.  
22  
23  
24

25 2008 Adaptive Management Plan

26 57. The 2000 management plan EIS/ROD did not address the annual May and  
27

1 June helicopter hazing operations because the decision to engage in those  
2 operations was not formally signed off on by the partner agencies, including  
3 the Forest Service, until December 17, 2008, when the agencies authorized  
4 what they called “Adaptive Adjustments to the Interagency Bison  
5 Management Plan,” hereinafter referred to as the “2008 management plan.”  
6

7  
8 58. The 2008 management plan memorialized the agencies’ decision “to  
9 formally incorporate adaptive changes to the [2000 management plan].”  
10

11 59. In relevant part, the 2008 management plan states the following:

12 Management Action 3.2.c-----Haze bison from the Hebgen basin  
13 into [Yellowstone National Park] with a target date of May 15.

14 *Monitoring Metric:*

15  
16 • Consistent with management action 1.1.a, assess the prevailing  
17 environmental conditions and reach consensus by May 13 on a  
18 step-wise, integrated plan for the end-of-winter return of bison  
19 into [Yellowstone National Park] from Zone 2 (Lead =  
MDOL/NPS).

20 • Annually document the timing of the end-of-winter return of  
21 bison into [Yellowstone National Park], the number of bison  
22 returned, prevailing environmental conditions, and success or  
23 lack thereof of hazing bison and getting them to remain in the  
24 park (Lead = MDOL/NPS)

25 60. The agencies’ new plan in December 2008 to allow hazing over National  
26 Forest lands in the Hebgen Basin starting May 15 annually was not  
27

1 accompanied by a NEPA analysis or ESA consultation.

2 2009 Horse Butte Capture Facility Permit

3  
4 61. On January 13, 2009, the Forest Service signed a Decision Memorandum  
5 renewing a 10 year permit (initially authorized in 1998), hereinafter referred  
6 to as the “permit,” for the Montana Department of Livestock to operate a  
7 bison capture facility on Gallatin National Forest lands on the Horse Butte  
8 peninsula near West Yellowstone, Montana.

9  
10  
11 62. The scope of the NEPA analysis for the permit covers bison hazing related  
12 to the capture facility from November 1 to April 30 annually.

13  
14 63. The NEPA analysis for the permit does not address any environmental  
15 effects of bison hazing into Yellowstone National Park after April 30 and  
16 before November 1 annually because such hazing is not associated with the  
17 capture facility. The Decision Memorandum for the permit states: “Hazing  
18 can occur with or without the presence of this capture facility and are not  
19 part of this decision” and that “[h]elicopter use is not authorized in  
20 association with the capture operation.”

21  
22  
23 64. In the NEPA analysis for the permit, the Forest Service assessed the grizzly  
24 bear only as a “sensitive species,” not as a species listed under the ESA.

25  
26 65. In the NEPA analysis for the permit, the Forest Service stated that there  
27

1 would be a “no-fly zone” around several bald eagle nests between  
2  
3 November 1 to April 30.

4 66. The Forest Service speculated that this “no-fly zone” from November 1 to  
5 April 30 annually around several bald eagle nests would adequately protect  
6 the Yellowstone grizzly bear during the operation of the capture facility:  
7 “There is a no fly zone in effect for Horse Butte (Attachment 1) which  
8 restricts aerial operations around all three bald eagles nests on the Butte.  
9 This no fly zone will also protect grizzly bear habitat in the non-denning  
10 season.”  
11

12  
13  
14 67. The Forest Service further promised in the NEPA analysis for the permit  
15 that “[i]f grizzly bear(s) are active in the area, the permittee may be required  
16 to cease operations.”  
17

18 68. The fact that these helicopter-use restrictions apply only during November 1  
19 to April 30 is clarified by the Montana Department of Livestock’s annual  
20 operating plan from 2008-2009, which stated that “Helicopter use related to  
21 the permitted bison capture facility on Horse Butte will not be conducted  
22 between February 1 and April 30 on National Forest lands west of the  
23 junction of Forest Road No. 610 and No. 6697, to the south boundary of the  
24 North Arm pasture (see “helicopter no fly zone” on Attachment 1).”  
25  
26  
27

1 69. The Montana Department of Livestock’s 2008-2009 operating plan further  
2 stated that “If grizzly bear(s) are active in the area, the permittee may be  
3 required to cease operations.”  
4

5 70. Finally, the Montana Department of Livestock’s 2008-2009 operating plan  
6 stated that “[h]azing and other requirements, as it [sic] is discussed herein, is  
7 [sic] limited to **only** those operations and activities that are directly related  
8 to the authorized facility. Other restrictions/mitigations regarding hazing  
9 **not** in association with the facility are referenced in the Bison Operating  
10 Procedures and agreed to by the Hebgen Lake Ranger District and the  
11 DOL” (emphasis in original).  
12  
13  
14

15 71. At the time of the permit approval, the Yellowstone grizzly bear was  
16 delisted, thus the Forest Service did not conduct ESA consultation for the  
17 grizzly bear even for the hazing between November 1 and April 30.  
18

19 72. However, in the initial 1998 permit application, the Forest Service did  
20 undergo ESA consultation for the grizzly bear and bald eagle for the time  
21 period affected by the permit.  
22

23 73. Based on the assumption that bears would still be in their dens in late April  
24 when the capture facility ceased to operate, the ESA consultation conclusion  
25 for the grizzly for the 1998 permit was “may affect, not likely to adversely  
26  
27



1 affect.” The NEPA analysis stated: “The capture facility would be  
2 operational between November 1 and April 30 at a time when most bears  
3 are denning. Since denning habitat is not present in the Horse Butte Area,  
4 there will be no effect to grizzly bears during the denning period at either  
5 Site A2 or at Site X. The No Action alternative would likely involve  
6 monitoring, hazing and shooting activities in the Horse Butte area during  
7 the denning period and would not effect [sic] denning grizzly bears. There  
8 are no known cumulative effects on grizzly bear that would occur during the  
9 denning period. This issue was eliminated from further consideration  
10 because there would be no known effects to grizzly bear during this period.”

11 74. Regarding the bald eagles, however, the agencies agreed that helicopter  
12 hazing would likely adversely affect bald eagles. Thus, the agencies issued  
13 a biological opinion and incidental take statement with restrictions on  
14 helicopter activity around eagle nests during the time period that the capture  
15 facility was in operation.

16 75. These eagle nest buffer zones constitute the “no-fly zone” for helicopters  
17 that is currently in effect from November 1 to April 30 on the Horse Butte  
18 peninsula.  
19  
20  
21

1 **VI. CLAIMS FOR RELIEF**

2 **FIRST CLAIM FOR RELIEF**

3  
4 The Forest Service’s authorization of recurrent, low-altitude  
5 helicopter use over National Forest lands within the  
6 Yellowstone Grizzly Bear Recovery Zone violates NEPA.

7 76. All previous paragraphs are incorporated by reference.

8  
9 77. NEPA directs federal agencies to prepare a detailed environmental impact  
10 statement (EIS) for federal actions that may significantly affect the  
11 environment.

12  
13 78. One factor that renders an action “significant” is the presence of a species  
14 listed under the Endangered Species Act.

15  
16 79. The twin purposes of NEPA analysis are to make sure that the *public* is fully  
17 informed of the environmental effects of agency actions, and to make sure  
18 that the *agency* is fully apprised of the effects of its planned activity before  
19 it decides on a course of action.

20  
21 80. In the EIS, the agency must take a “hard look” at the effects of the activity  
22 on the environment, including the direct, indirect, and cumulative effects.

23  
24 81. The Council on Environmental Quality (CEQ) regulations require that an  
25 agency “prepare supplements to either draft or final environmental impact  
26 statements if (i) The agency makes substantial changes in the proposed  
27

1 action that are relevant to environmental concerns; or (ii) There are  
2 significant new circumstances or information relevant to environmental  
3 concerns and bearing on the proposed action or its impacts.”

4  
5 82. The Forest Service has failed to conduct a NEPA analysis to assess the  
6 direct, indirect, and cumulative environmental effects on threatened  
7 Yellowstone grizzly bears of permitting recurring low-altitude helicopter  
8 flights over the Yellowstone Grizzly Bear Recovery Zone. The cumulative  
9 effects include reasonably foreseeable timber sales in the area, such as the  
10 Lonesome Wood Project, *see Native Ecosystems Council v Tidwell*, CV-09-  
11 17-M-DWM, dkt # 27 (D. Mont.)(Nov. 18, 2009)(stipulation of dismissal of  
12 first approval of the project), as well as all aspects of the sweeping Basin-  
13 wide hazing operations, including the indiscriminate (as to grizzly bears)  
14 use of off road motorized vehicles and exploding ammunition.  
15

16  
17  
18  
19 83. Neither the 2008 management plan nor the 2011 annual decision to allow  
20 recurring low-altitude helicopter flights in undisputedly occupied grizzly  
21 bear habitat in the Hebgen Basin in the Gallatin National Forest during  
22 spring and summer grizzly bear season were accompanied by a NEPA  
23 analysis.  
24

25  
26 84. The Forest Service cannot abdicate its responsibility to conduct a NEPA  
27

1 analysis for this activity by “tiering” to any other former NEPA analysis  
2 because no other NEPA analysis addressed this activity either.  
3

4 85. As discussed above, the only three potentially relevant former NEPA  
5 analyses all failed to squarely address the issue of effects on threatened  
6 grizzly bears from low-altitude, recurring helicopter hazing operations in  
7 May and June annually in the Hebgen Basin: (1) the NEPA analysis for the  
8 1987 Gallatin Forest Plan did not address this issue; (2) the NEPA analysis  
9 for the 2000 Interagency Bison Management Plan did not address this issue;  
10 and (3) the NEPA analyses for the Horse Butte Capture Facility permits did  
11 not address this issue.  
12  
13  
14

15 86. To the contrary, as noted above, the NEPA analyses for the 2000  
16 management plan and 2009 permit both expressly represented that the  
17 Forest Service would not allow hazing operations on the Gallatin National  
18 Forest if there were grizzly bears present in the area. The 2000 management  
19 plan analysis promised: “Currently, hazing operations would cease if there  
20 was evidence of grizzlies being active in the area.” The 2009 permit  
21 analysis promised: “[i]f grizzly bear(s) are active in the area, the permittee  
22 may be required to cease operations.”  
23  
24  
25

26 87. The Forest Service has not conducted any supplemental NEPA analysis for  
27

1 any of those prior analyses to reflect their new 2008 decision to allow  
2 helicopter hazing over National Forest lands in the Hebgen Basin in May  
3 and June annually.  
4

5 88. The Forest Service's failure to conduct a NEPA analysis that squarely  
6 acknowledges and addresses the issue of effects on threatened grizzly bears  
7 from low-altitude, recurring helicopter hazing operations over National  
8 Forest lands in May and June annually in the Hebgen Basin violates NEPA.  
9

10  
11 89. In addition, the Forest Service's failure to address this issue makes it  
12 impossible to determine whether it is complying with the Gallatin Forest  
13 Plan standards that apply to this issue, as discussed below, which also  
14 violates NEPA.  
15

16  
17 SECOND CLAIM FOR RELIEF

18 The Forest Service's authorization of recurrent, low-altitude  
19 helicopter use over National Forest lands within the  
20 Yellowstone Grizzly Bear Recovery Zone violates NFMA.

21 90. All previous paragraphs are incorporated by reference.  
22

23 91. NFMA requires that the Forest Service promulgate Land and Resource  
24 Management Plans, i.e. Forest Plans, that will manage National Forest lands  
25 in a manner that conserves biodiversity.  
26

27 92. The provisions of a Forest Plan are legally enforceable under NFMA.  
28

1 93. The Forest Plan prohibits activities that will adversely affect grizzly bears.

2  
3 94. The Forest Plan requires that “sufficient area is left undisturbed from  
4 detrimental human activities to meet the biological requirements of grizzly  
5 bears.”

6  
7 95. The Forest Plan requires formal ESA consultation if an activity “may affect”  
8 grizzly bears.

9  
10 96. The Forest Plan forbids uses on MS-1 and MS-2 lands unless they are  
11 compatible with grizzly bear needs.

12 97. The Forest Plan requires that anyone who is authorized “to conduct  
13 activities in occupied grizzly bear habitat” must receive a letter from the  
14 Forest Service that orders the permittee to conduct their activities “in a  
15 manner which will prevent or minimize the opportunity for conflicts with  
16 the grizzly bear.” The letter must inform the permittee that “violations of  
17 the Endangered Species Act can result in the termination” of their  
18 authorization to conduct activities on National Forest lands.  
19  
20  
21

22 98. The Forest Plan requires that the Forest Service protect habitat in a manner  
23 that will maintain viable and recovered populations of grizzly bears.  
24

25 99. The Forest Plan requires that the Forest Service strive to avoid human-  
26 caused grizzly bear losses.  
27

1 100. The Forest Plan requires that management activities favor grizzly bear  
2 recovery and states that it “may be necessary to restrict human activity  
3 within occupied grizzly bear habitat to reduce human/grizzly bear  
4 confrontations.”  
5

6  
7 101. As discussed above, the Forest Service has failed to assess the  
8 environmental effects on threatened Yellowstone grizzly bears of permitting  
9 recurring low-altitude helicopter flights in May and June annually over  
10 occupied habitat for the threatened Yellowstone grizzly bear. Without such  
11 an analysis it is impossible to determine whether the Forest Service is  
12 meeting all of these grizzly bear-related Forest Plan obligations.  
13  
14

15 102. The Forest Service’s failure to demonstrate compliance with these Forest  
16 Plan provisions violates the Forest Plan and therefore violates NFMA.  
17

18 103. Even if the Forest Service had conducted an analysis that addressed all of  
19 these Forest Plan provisions, the challenged activity would not comply with  
20 these provisions because recurring, low-altitude helicopter flights harass  
21 grizzly bears and cause them to flee while in the midst of critical spring  
22 feeding activities. Thus, the challenged activity has adverse effects on  
23 bears, disturbs habitat necessary to meet the biological requirements of  
24 bears, is not compatible with grizzly bear needs, does not prevent or  
25  
26  
27

1 minimize conflict with grizzly bears, violates the ESA, threatens the  
2 viability and recovery of this population, does not strive to avoid human-  
3 caused grizzly bear losses, and does not favor grizzly bear recovery, which  
4 all violate the Forest Plan, in violation of NFMA.  
5

6  
7 **VII. RELIEF REQUESTED**

8 For all of the above stated reasons, Plaintiff requests that this Court award the  
9 following relief:  
10

- 11 A. Declare that helicopter hazing operations over National Forest lands in the  
12 Hebgen Basin in May and June annually, within the Yellowstone Grizzly  
13 Bear Recovery Zone, violate the law;  
14
- 15 B. Enjoin implementation of helicopter hazing operations over National Forest  
16 lands in the Hebgen Basin in May and June annually, within the  
17 Yellowstone Grizzly Bear Recovery Zone;  
18
- 19 C. Award Plaintiff its costs, expenses, expert witness fees, and reasonable  
20 attorney fees under the EAJA; and  
21
- 22 D. Grant Plaintiff any such further relief as may be just, proper, and equitable.  
23  
24

25 Respectfully submitted this 18<sup>th</sup> Day of May, 2011.

26 //



1 //  
2 //

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