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11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF WASHINGTON

13 ALLIANCE FOR THE WILD ROCKIES, a
non-profit corporation,

14 Plaintiff,

15 v.

16 GAIL KIMBELL in her official capacity as
Regional Forester for the U.S. Forest Service,
17 Region 1; U.S. FOREST SERVICE; MIKE
JOHANNIS in his official capacity as
18 Secretary of the U.S. Department of
Agriculture; UNITED STATES
19 DEPARTMENT OF AGRICULTURE; DIRK
KEMPTHORNE in his official capacity as
20 Secretary of the U.S. Department of the
Interior; U.S. DEPARTMENT OF THE
21 INTERIOR; H. DALE HALL in his official
capacity as U.S. Fish and Wildlife Service
22 Director; U.S. FISH AND WILDLIFE
SERVICE; DAVE ALLEN in his official
23 capacity as Regional Director for Region 1 of
the U.S. Fish and Wildlife Service,

24 Defendants.
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26
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CV _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

1 **INTRODUCTION**

2 1. This case concerns the straightforward question of whether the
3 “Boundary” timber sale, which includes helicopter logging in “core” grizzly bear
4 habitat located in the Selkirk Mountains, will adversely affect the small, imperiled
5 population of grizzly bears that is located there. Defendants, the U.S. Forest
6 Service (“FS”) and U.S. Fish and Wildlife Service (“FWS”), claim that it will not.
7 Plaintiff, the Alliance for Wild Rockies – an organization dedicated to protecting
8 and restoring grizzly bear populations and habitat in the Selkirk Recovery Zone –
9 contends that the record and the best scientific data available conclusively show
10 that it will, or that, at a minimum, the government must consider the question
11 further in order to ensure, as it must, that the planned helicopter logging will not
12 jeopardize the bears’ continued existence, and that no unlawful “take” of grizzly
13 bears will occur as a result of these activities.

14 2. Plaintiff brings this case for declaratory and injunctive relief against
15 defendants pursuant to the citizen suit provision of the Endangered Species Act
16 (“ESA”), 16 U.S.C. § 1540(g), and the Administrative Procedure Act (“APA”), 5
17 U.S.C. §§ 701-706, for violations of the ESA.

18 3. This civil action arises out of defendant FS’s decision to allow
19 logging activities, including helicopter logging, within “core” grizzly bear habitat
20 in the Selkirk Grizzly Bear Recovery Zone, which is located in the Idaho
21 Panhandle National Forest (“IPNF”). Defendants intend to proceed – soon – with
22 a project known as the “Boundary Timber Sale” without first completing “formal
23 consultation” with FWS pursuant to Section 7 of the Endangered Species Act
24 (“ESA”) to consider the specific question of how *these* activities will affect grizzly
25 bears in their core habitat, and without obtaining a Biological Opinion (“BiOp”)
26 and Incidental Take Statement (“ITS”) for that specific question. Thus, defendants
27 have failed to ensure that this timber sale and these activities will not jeopardize
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1 the continued existence of grizzly bears in the Selkirk or result in unlawful “take”
2 of these bears as a result.

3 4. In “biological assessments” (“BA”) prepared in 2001 and 2005, FS
4 concluded, and FWS twice concurred, that the Boundary Timber Sale is “not likely
5 to adversely affect” the Selkirk population of grizzly bears. In reaching this
6 conclusion, FS avoided its mandatory duty, pursuant to Section 7 of the ESA, to
7 engage in “formal consultation” with FWS to fully consider the impacts of the
8 proposed logging activities on grizzly bears, and, thus, ensure that activities
9 associated with the Boundary Timber Sale are not likely to jeopardize the
10 continued existence of the grizzly bears in the Selkirk ecosystem.

11 5. FS’s decision not to complete “formal consultation” and obtain a
12 BiOp and ITS for the helicopter logging project, as required by Sections 7 and 9 of
13 the ESA and its implementing regulations, 16 U.S.C. §§ 1536, 1538, 50 C.F.R.
14 Part 402, is “arbitrary and capricious, an abuse of discretion, and not in accordance
15 with law,” and represents “agency action unlawfully withheld or unreasonably
16 delayed,” within the meaning of the APA. 5 U.S.C. §§ 706(1), (2)(A).

17 6. FWS’s decisions to concur, in 2001 and 2005, with FS determinations
18 that the Boundary Timber Sale is not likely to adversely affect grizzly bears, are
19 arbitrary and capricious, an abuse of discretion, not in accordance with procedures
20 provided by law, and not in accordance with Section 7 of the ESA, within the
21 meaning of Section 706 of the APA. 5 U.S.C. § 706(2)(A).

22 7. Plaintiff is therefore compelled to bring this civil action.

23 8. This Court has jurisdiction over this action pursuant to the citizen suit
24 provisions of the ESA. 16 U.S.C. §§ 1540(g)(1), 1540(g)(2)(C). The Court also
25 has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346, because this action
26 involves the United States as a defendant and arises under the laws of the United
27 States, including the ESA, 16 U.S.C. § 1531 *et seq.*, and the APA, 5 U.S.C. § 701

1 *et seq.* The requested relief is proper under 16 U.S.C. § 1540(g)(1); 28 U.S.C. §§
2 2201, 2202, 1361; and 5 U.S.C. §§ 704, 705, 706.

3 9. The Court has the authority to review the agency inaction and/or
4 action of the defendants complained of herein, and grant the relief requested
5 pursuant to the ESA's citizen suit provision, 16 U.S.C. § 1540(g), and the APA, 5
6 U.S.C. §§ 701-706.

7 10. In compliance with 16 U.S.C. § 1540(g)(2)(c), on January 10, 2006,
8 plaintiff gave notice to defendants of the ESA violations specified in this
9 complaint, and of plaintiff's intent to file suit. A copy of the notice letter is
10 attached to this complaint as Exhibit A. Over 60 days have passed since the notice
11 was properly served. The violations complained of in the notice letter are
12 continuing and have not been remedied.

13 11. The relief sought is authorized by 28 U.S.C. § 2201 (Declaratory
14 Judgment), 28 U.S.C. § 2202 (Injunctive Relief), 16 U.S.C. § 1540 (ESA), and 5
15 U.S.C. § 706 (APA).

16 12. Venue is properly before this Court pursuant to 28 U.S.C. § 1391(e).
17 FWS's concurrence letters to the FS giving rise to the claims in this complaint,
18 dated July 26, 2001 and Nov. 30, 2005, originated from the FWS office in
19 Spokane, Washington, which is located in the Eastern District of Washington. In
20 addition, the Selkirk Recovery Zone at issue in this complaint is partially located
21 in Eastern Washington.

22 13. There is a present and actual controversy between the parties.

23 **PARTIES**

24 14. Plaintiff ALLIANCE FOR THE WILD ROCKIES ("Alliance") is a
25 non-profit corporation with approximately 2,000 members throughout the United
26 States. The Alliance's mission is to protect and secure the ecological integrity of
27 the Wild Rockies bioregion through citizen empowerment and the application of
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1 conservation biology, sustainable economic models, and environmental law. The
2 Alliance, and its members and staff, believe that all species and their natural
3 communities have the right to exist and thrive.

4 15. Members and staff of the Alliance live in and around the Selkirk
5 Recovery Zone and view, or attempt to view, grizzly bears, and for other
6 observational, recreational, scientific, and educational purposes and for research
7 and aesthetic enjoyment, and intend to continue to do so. The Alliance's members
8 and staff derive scientific, recreational, conservation, and aesthetic benefits from
9 the grizzly's existence in the wild. The Alliance's members and staff are also
10 working to protect and restore grizzly bear populations in the Selkirk Mountains.
11 For the Alliance's members and staff, working to protect and restore grizzly bears
12 in the region and observing grizzlies in the wild, as well as being aware of the
13 presence of grizzly bears and the health of grizzly habitat, are key components to
14 their enjoyment of these areas. The Alliance's members and staff have a specific,
15 concrete interest in protecting and restoring the grizzly bears and their habitat in
16 the Selkirks, and are leading a campaign with other conservation groups to that
17 end. Defendants' failure to comply with the ESA, by issuing "not likely to
18 adversely affect" determinations, has harmed, and continues to harm, the
19 Alliance's concrete interests.

20 16. Defendant GAIL KIMBELL is sued in her official capacity as
21 Regional Forester for the U.S. Forest Service, Region 1. Ms. Kimbell is the
22 federal official with ultimate responsibility for all Forest Service officials'
23 inactions or actions in Region 1, which includes the Idaho Panhandle National
24 Forest, at issue in this complaint.

25 17. Defendant FOREST SERVICE is an agency within the U.S.
26 Department of Agriculture that is responsible for applying and implementing the
27 federal laws and regulations challenged in this complaint.

1 18. Defendant MIKE JOHANNNS is sued in his official capacity as
2 Secretary of the U.S. Department of Agriculture. Mr. Johanns is the federal
3 official with ultimate responsibility for all FS officials' inactions or actions
4 challenged in this complaint.

5 19. Defendant UNITED STATES DEPARTMENT OF AGRICULTURE
6 ("USDA") is a department of the United States Government with supervisory and
7 managerial responsibility over the U.S. Forest Service and is responsible for
8 applying and implementing the federal laws and regulations challenged in this
9 complaint.

10 20. Defendant DIRK KEMPTHORNE is sued in his official capacity as
11 Secretary of the U.S. Department of the Interior. As Secretary of the Department
12 of the Interior, Mr. Kempthorne is the federal official with ultimate responsibility
13 for all FWS officials' actions or inactions challenged in this complaint.

14 21. Defendant U.S. DEPARTMENT OF THE INTERIOR is a department
15 of the United States Government with supervisory and managerial responsibility
16 over FWS and is responsible for applying and implementing the federal laws and
17 regulations challenged in this complaint.

18 22. Defendant H. DALE HALL is sued in his official capacity as FWS
19 Director. As FWS Director, Mr. Hall is the federal official with responsibility for
20 all FWS officials' actions or inactions challenged in this complaint.

21 23. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency
22 within the Department of Interior that is responsible for applying and
23 implementing the federal laws and regulations challenged in this complaint.

24 24. Defendant DAVE ALLEN is sued in his official capacity as Regional
25 Director for Region 1 of the U.S. Fish and Wildlife Service. As Regional
26 Director, Mr. Allen is the federal official with ultimate responsibility for all FWS
27 officials' actions or inactions in Region 1 which includes the Idaho Panhandle

1 National Forest at issue in this complaint.

2 **STATEMENT OF RELEVANT FACTS**

3 **The Grizzly Bear**

4 25. The grizzly bear (*Ursus arctos horribilis*) is generally larger than the
5 black bear, weighs between 200 and 600 pounds, and has long, curved claws,
6 humped shoulders, and a concave face. FWS, Amended Biological Opinion for
7 the Continued Implementation of the Idaho Panhandle National Forests Land and
8 Resource Management Plan (Apr. 11, 2001) (“2001 BiOp”) at 10. Grizzly bears
9 are a wide-ranging and individualistic species. *Id.*

10 26. Grizzly bears once inhabited most of the western continental United
11 States, and numbered approximately 50,000 animals in the early 1880s, but
12 “[s]ince the arrival of Europeans in North America,” have been “eliminated from
13 all but approximately two percent of [the species’] original range in the lower 48
14 states.” *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 102 (D.D.C. 1995) (citing
15 FWS, Grizzly Bear Recovery Plan (1993) (“Grizzly Bear Recovery Plan”) at ix, 9-
16 10); 2001 BiOp at 10. This decline is due to many specific factors such as habitat
17 loss and deterioration, trapping, hunting, and livestock depredation control. *Id.*

18 27. The grizzly bear now persists in five remnant populations in
19 contiguous and relatively undisturbed mountainous regions, national parks, and
20 wilderness areas in small portions of the states of Washington, Idaho, Montana,
21 and Wyoming. Grizzly Bear Recovery Plan at ix, 9-10; 2001 BiOp at 10. It is
22 estimated that today there are fewer than 1,000 grizzlies in the lower 48 states.
23 2001 BiOp at 10-11.

24 28. On July 28, 1975, the grizzly bear was listed under the ESA as
25 “threatened” with extinction throughout the lower 48 United States. 40 Fed. Reg.
26 31,734 (July 28, 1975).

1 29. Pursuant to the ESA, FWS is required to “develop and implement” a
2 “recovery plan” for each threatened or endangered species. 16 U.S.C. § 1533(f).
3 A recovery plan “is supposed to be a basic road map to recovery, *i.e.*, the process
4 that stops or reverses the decline of a species and neutralizes threats to its
5 existence.” *Fund for Animals*, 903 F.Supp. at 103.

6 30. In 1993, FWS released a “recovery plan” for the grizzly bear, as
7 required by the ESA. *See generally* Grizzly Bear Recovery Plan. The plan calls
8 for stabilizing remnant populations of grizzly bears in five “Recovery Areas,”
9 which include the Yellowstone, North Continental Divide, North Cascades, and
10 Cabinet-Yaak Recovery Areas, and the Selkirk Recovery Area that is at issue in
11 this case. 2001 BiOp at 10.

12 31. The Grizzly Bear Recovery Plan also established the “Interagency
13 Grizzly Bear Committee” (“IGBC”) to generate specific recommendations
14 concerning management planning for grizzly bears in each Recovery Area.

15 **The Selkirk Recovery Area**

16 32. The IPNF includes portions of two grizzly bear Recovery Areas: the
17 Selkirk and Cabinet-Yaak.

18 33. The Selkirk Recovery Area, which spans the U.S.-Canada border and
19 contains the area impacted by the timber sale at issue in this case, encompasses
20 about 2,000 square miles in northeastern Washington, northern Idaho, and
21 southern British Columbia. 2001 BiOp at 7. IPNF administers about 21 percent
22 of this recovery area. *Id.*

23 34. In 2004, FWS estimated that the Selkirk population contains
24 approximately 46 bears, while the Recovery Plan states there must be a minimum
25 of 90 bears for this population to avoid extinction. 2001 BiOp at 18. There were
26 eight known human-caused bear mortalities between 1994 and 1999 alone. This
27 was a loss of 17 percent of the total population of bears in the Selkirk Ecosystem

1 that exceeded, by threefold, the outer limit on such mortalities that is set forth in
2 the Recovery Plan. *Id.* at 21-22, 33; *see also* FWS, Biological Opinion on the
3 Proposed Forest Plan Amendments for Motorized Access Management within the
4 Selkirk and Cabinet-Yaak Grizzly Bear Recovery Zones for the Kootenai, Idaho
5 Panhandle, and Lolo National Forests (Feb. 9, 2004) (“2004 BiOp”) at 34 (Tables
6 2, 3). The Selkirk Recovery Area “is not meeting any of the recovery goals
7 outlined in the Recovery Plan.” 2001 BiOp at 20.

8 35. In a 1999 administrative finding, FWS determined that the Selkirk
9 population of grizzly bears should be up-listed under the ESA, from “threatened”
10 to “endangered” status. 64 Fed. Reg. 26725 (May 17, 1999). Reclassification of
11 the population to endangered status, however, has been delayed for the past seven
12 years due to a lack of administrative resources. *See, e.g.*, 70 Fed. Reg. 24870,
13 24925 (May 11, 2005).

14 **Displacement of Grizzly Bears from Core Habitat Due to Roads and Human**
15 **Activities, Including Helicopter Logging**

16 36. It is widely recognized that several forms of human activity displace
17 grizzly bears, who learn to avoid human intrusion into their habitat, including long
18 after the human activity has ceased and can even pass such learned behavior to
19 their offspring.

20 37. For example, grizzly bears learn to avoid roads, including closed
21 roads, out of a fear of human activity. *See, e.g.*, 2001 BiOp at 20, 23-25, 29
22 (“grizzly bears tend to avoid closed roads as well as open roads”).

23 38. FWS has recognized that even occasional or low levels of human
24 activity and its associated scents and noises can displace grizzlies from preferred
25 habitats and that these displacements can “persist for several generations.” FWS,
26 Biological Opinion On The Effects Of The Moose Post Fire Project On Grizzly
27 Bears, Flathead National Forest (Nov. 14, 2002) at 24, 25 (“2002 FH BiOp”).

1 39. The effects of displacement from motorized access can last
2 generations – “research suggests that females with cubs typically avoid areas of
3 high road densities,” 2002 FH BiOp at 24, 25, and “may also teach their cubs to
4 avoid roads, resulting in a learned avoidance behavior which can persist for
5 several generations of bears.” *Id.* at 26 (citation omitted); *see also id.* (“Grizzly
6 bears can develop a negative association with roads due to their fear of vehicles,
7 vehicle noise, other human-related noise around roads, human scent along roads,
8 and hunting and shooting along or from roads. Bears experiencing such negative
9 effects learn to avoid the disturbance associated with roads, and such animals are
10 unlikely to change this avoidance behavior even after road closures.”).

11 40. Logging adversely affects grizzly bears through “habitat loss,
12 modification, and fragmentation; decrease in available cover; increased human
13 access due to road construction resulting in changes in bear behavior (either bear
14 displacement or habituation); and increased mortality risk.” 2001 BiOp at 49.

15 41. The noise and disturbance from overhead helicopter traffic is greater
16 than that of ground-based motorized vehicles, which, as FWS acknowledges,
17 grizzly bears avoid and/or flee from.

18 42. According to a 1998 FWS memorandum, helicopter logging in core
19 habitat adversely affects grizzly bears, and these effects must be mitigated.
20 *See* Interim Access Management Strategy (Jan. 13, 1998); *see also id.* at 2 (“The ½
21 mile radius represents the helicopter influence zone for both core and secure
22 habitat calculations.”). By the 1998 FWS memorandum, action agencies were
23 instructed to calculate an “influence zone” that is created by helicopter use in core
24 grizzly bear habitat that “would extend for ½ mile radius from the helicopter [line
25 of flight].” *Id.* The memorandum required that, in BMUs with less than 55
26 percent core, “[f]or timber sales, including helicopter sales, that impact core
27 habitat,” an “equivalent amount of core habitat must be provided elsewhere in the
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1 BMU prior to project implementation” and “post-project conditions must result in
2 an overall increase in core habitat, to ensure steady progress toward reaching the
3 anticipated core standard.” *Id.* In addition, the memorandum stated that, while
4 “[m]echanized/industrial type activities . . . proposed within core or secure habitat
5 may be acceptable,” they are “subject to consultation with FWS” pursuant to
6 Section 7(a)(2) of the ESA. *Id.* at 1.

7 43. FS “deducts” helicopter logging from calculations of core habitat in
8 the Yellowstone Recovery Area. FS, Forest Plan Amendments for Grizzly Bear
9 Conservation for the Greater Yellowstone Area National Forests (July 2004) at 27.

10 44. Contrary to these findings and agency policies, FS has concluded, and
11 FWS has concurred, that helicopter logging in the Boundary Timber Sale, in core
12 habitat, will not adversely affect grizzly bears or their habitat. *See* IPNF,
13 Amended Biological Assessment, *Grizzly Bear and Canada Lynx*, for the
14 BlueGrass Bound Environmental Assessment (July 23, 2001) (“2001 Amended
15 BA”); FWS, Reinitiation of Consultation for the BlueGrass Bound Project (July
16 26, 2001) (“2001 LOC”); IPNF, Amended Biological Assessment, *Grizzly bear
17 and Canada lynx*, for the BlueGrass Bound Environmental Assessment (Nov. 16,
18 2005) (“2005 Amended BA”); FWS, Reinitiation of Consultation on the Blue-
19 Grass Bound Project (Nov. 30, 2005) (“2005 LOC”). The facts leading up to these
20 arbitrary conclusions are set forth below.

21 **Habitat Standards for the Selkirk Recovery Area**

22 45. There are several “habitat standards” that have been developed by FS
23 and the IGBC that are supposed to provide a set of benchmarks against which the
24 agencies ascertain whether proposed activities that impact Selkirk grizzly bears
25 may go forward.

26 46. The first of these habitat standards was FS’s “security” standard. The
27 1986 Forest Plan for the IPNF – which sets forth forest-wide management

1 direction and standards for IPNF activities – established a standard of a minimum
2 of 70 square miles of “secure” habitat – *i.e.*, habitat that is “at least one quarter
3 mile from open roads, developments, and high levels of human activity” – in each
4 BMU. 2001 BiOp at 24. The security standard was supposed to ensure “the
5 minimum viable habitat needed to avoid bear displacement.” *Id.*

6 47. In 1994, recognizing the need to better manage the effects of
7 motorized access to core grizzly bear habitat, the Interagency Grizzly Bear
8 Committee – the committee created by the Grizzly Bear Recovery Plan – directed
9 its Subcommittees to establish, for each grizzly bear recovery zone, Ecosystem-
10 specific standards for: (1) open motorized road density (“OMRD”); (2) total
11 motorized road density (“TMRD”); and (3) “core” areas containing representative
12 seasonal habitats – *i.e.*, “areas free of motorized access and high levels of human
13 use.” 2001 BiOp at 29, 30.

14 48. In 1998, at the direction of the IGBC Committee, an IGBC-sponsored
15 “Access Taskforce” released a report, which provides instruction to federal
16 agencies for evaluating the effects of motorized access on grizzly bears within
17 grizzly bear recovery zones. IGBC Taskforce Report Revision (July 29, 1998)
18 (“Taskforce Report”). The Taskforce “defined ‘core areas’ as those areas with no
19 motorized access (during the non-denning period) or heavily used foot/livestock
20 trails, providing some level of secure habitat for grizzly bears.” FWS, Biological
21 Opinion on Flathead National Forest Plan -Revised Implementation Schedule - on
22 Grizzly Bears (Oct. 25, 2005) at 85.

23 49. Pursuant to the IGBC recommendations, in 2004, FS established
24 habitat standards, which provide that: (1) no more than 33 percent of BMU shall
25 have an OMRD greater than one mile per square mile; (2) no more than 26 percent
26 of the BMU shall have a TMRD of greater than two miles per square mile; and (3)
27 each BMU should have at least 55 percent core habitat. 2004 BiOp at 40.

1 50. “Core habitat is defined as areas greater than or equal to 0.31 miles
2 from any road (open or restricted), motorized trail, or high intensity use area.”
3 2004 BiOp at 11.

4 51. The IPNF is currently not meeting two of the three habitat standards
5 in the BlueGrass BMU, for core and TMRD.

6 **The BlueGrass Bound Project and The Boundary Timber Sale**

7 52. The Selkirk Recovery Area, like all grizzly bear Recovery Zones,
8 encompasses several “bear management units” (“BMU”), including the BlueGrass
9 BMU, a 90 square-mile area that includes the area impacted by the timber sale at
10 issue in this lawsuit. The Blue Grass BMU is a “high priority” BMU and provides
11 “key, year-round habitat for the Selkirk grizzly bear population.” 2001 BiOp at
12 24. According to FWS, “[m]aintenance of adequate habitat conditions in this
13 BMU is particularly essential because of its importance to the Selkirk grizzly
14 population. 2004 BiOp at 28. The BlueGrass BMU is the most highly used by
15 grizzly bears in the entire United States portion of the Selkirk Recovery Area.

16 **A. The 1999 BlueGrass Environmental Assessment**

17 53. The Boundary Timber Sale has a long and rather complex procedural
18 history.

19 54. In 1999, IPNF approved the BlueGrass Bound Environmental
20 Assessment and Finding of No Significant Impact, including four timber sales,
21 two of which would become the Boundary Timber Sale that is at issue in this case.
22 *See* USDA & FS, BlueGrass Bound Environmental Assessment (June 1999)
23 (“BlueGrass Bound EA”). The EA proposed logging on a total of 2,108 acres in
24 the Bonners Ferry Ranger District of the IPNF – which includes core grizzly bear
25 habitat contained in the Blue Grass BMU – and included helicopter logging. *Id.* at
26 IV-18.

27 55. In connection with its preparation of the BlueGrass Bound EA, IPNF
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1 prepared a “Wildlife Input” to the EA, in which IPNF analyzed the effects of the
2 BlueGrass Bound Timber Sale on imperiled species in the action area. *See*
3 Wildlife Input – BlueGrass Bound Timber Sale (June 12, 1998). The Wildlife
4 Input concluded that the proposed activities are “not likely to adversely affect the
5 grizzly bear or its habitat.” *Id.* at 19. The Wildlife Input document, however, set
6 forth several “Conservation Requirements” that are “mandatory” for the “no
7 adverse effect” determination to remain valid, including the requirement that there
8 be “no net loss of core habitat.” *Id.* at 24.

9 56. In 1999, FWS prepared a Biological Opinion pursuant to Section
10 7(a)(2) of the ESA, which evaluated the effects of the proposed BlueGrass Bound
11 EA activities on listed species, including the grizzly bear. *See* Section 7
12 Consultation for BlueGrass Bound Timber Sale, Boundary Creek Road
13 Obliteration, and Grass Creek Range Allotment (July 1, 1999) (“1999 BiOp”).
14 Contrary to IPNF’s assertion that the activities would not likely adversely affect
15 grizzly bears, FWS concluded that “grizzly bears will be adversely affected by the
16 cumulative effects of management activities proposed over the next eight years.”
17 *Id.* at 24. FWS based its conclusion on the following, among other factors: (1)
18 once the proposed activities were completed, core habitat levels still would not
19 meet the 55 percent core standard established by the IGBC Subcommittee for the
20 Cabinet-Yaak and Selkirk populations; (2) summer habitat security levels will
21 decrease; and (3) the BlueGrass BMU is a “high priority BMU in the Selkirk
22 ecosystem, supplying key year-round habitat components and being extensively
23 used by grizzly bears.” *Id.* at 25.

24 57. In the Biological Opinion for the BlueGrass Bound EA, FWS
25 concluded that the proposed activities, including the Boundary Timber Sale, will
26 result in the “take” of grizzly bears as defined by Section 9 of the ESA and its
27 implementing regulations. 1999 BiOp at 31. FWS determined that the take would
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1 be in the form of “harm” resulting from maintaining the BMU below the habitat
2 standards, including activities occurring in the BMU that will result in IPNF’s
3 failure to meet the 55 percent core standard in three years, and by temporarily
4 increasing total road density. *Id.*

5 58. On July 21, 1999, IPNF signed the Decision Notice for the BlueGrass
6 Bound EA. *See* IPNF Decision Notice, BlueGrass Bound EA (July 21, 1999).

7 **B. The 2001 BiOp**

8 59. After the BlueGrass Bound EA was finalized in 1999, AWR sued
9 IPNF for its failure to manage for grizzly bear habitat on a forest-wide basis. A
10 Settlement Agreement in that case was reached in 2001, which required IPNF to
11 complete formal consultation and a formal amendment to the IPNF Forest Plan for
12 grizzly bear management. 2001 Amended BA at 1.

13 60. Pursuant to the terms of the Settlement Agreement, FWS amended the
14 Biological Opinion for the IPNF Forest Plan “to include an analysis of incidental
15 take and an incidental take statement” pursuant to Section 9 of the ESA and its
16 implementing regulations. 2001 BiOp at 1.

17 61. That BiOp concluded that “existing high road densities and
18 insufficient core habitat within the IPNF boundaries in the Selkirk and Cabinet-
19 Yaak Ecosystems result in significant habitat modification or degradation which
20 causes actual injury to grizzly bears by significantly disrupting normal behavioral
21 patterns, including breeding, feeding, or sheltering.” 2001 BiOp at 58. FWS
22 specified that “take of grizzly bears, in the form of harm,” occurs in these
23 Ecosystems, whenever OMRD exceeds one mi/mi² in over 33 percent of a BMU,
24 TMRD exceeds two mi/mi² in over 26 percent of a BMU, or when core habitat
25 makes up less than 55 percent of a BMU. *Id.* at 58-59.

26 62. In the 2001 BiOp, although FWS approved FS plans to continue its
27 management actions under the IPNF Forest Plan, FWS specifically admonished
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1 IPNF that, “[i]n order to be exempt from the prohibitions of section 9 of the Act,”
2 FS must strictly comply with certain “terms and conditions” contained in the
3 incidental take statement (ITS) that accompanied the 2001 BiOp. 2001 BiOp at
4 62. That ITS required, among other things, IPNF to ensure that BMUs such as the
5 Blue Grass BMU have a “minimum core area” of 52 percent by March 31, 2004.
6 *Id.* at 62. In April 2004, FWS observed that the BlueGrass BMU “contains 50
7 percent core habitat” – *i.e.*, two percent below the level required by the 2001 BiOp
8 at that time. 2004 BiOp at 16.

9 **C. The 2001 Amended BA and FWS’s Concurrence**

10 63. Also in 2001, in an “Amended Biological Assessment,” IPNF
11 reevaluated the effects of the BlueGrass Bound Project on grizzly bears and
12 Canada lynx, including logging plans. 2001 Amended BA. The Amended BA
13 noted that, despite road obliteration activities during 1999-2000 that had resulted
14 in an improvement in road density standards, the BlueGrass BMU still did not
15 meet two of the habitat standards, including core and TMRD. *Id.* at 5. At that
16 time, IPNF estimated that the core standard in the BlueGrass BMU, while
17 improving due to removal of roads, at 50 percent was still far below the minimum
18 core habitat standard of 55 percent, and that at 29 percent, the TMRD still
19 exceeded the TMRD standard of 26 percent. *Id.*

20 64. In the 2001 Amended BA, IPNF determined that logging pursuant to
21 the Boundary Timber Sale “will not result in a reduction of core” grizzly bear
22 habitat, *despite* the fact that it will entail the use of helicopter logging in “key”
23 grizzly bear habitat that is used by bears throughout the year. 2001 Amended BA
24 at 11 (emphasis added). The 2001 Amended BA concluded that Boundary Timber
25 Sale activities – including helicopter logging in core grizzly bear habitat and the
26 “high priority” BlueGrass BMU – are “not likely to adversely [a]ffect grizzly bears
27 or their habitat.” *Id.* at 13.

1 65. The 2001 Amended BA included two “conservation requirements”
2 that are “non-discretionary” and “necessary to achieve the current determination of
3 [no] effects” to grizzly bears – *i.e.*, (1) that security be “maintained during
4 administration of the timber harvest and post-sale activities,” and (2) that there be
5 “no net loss” of core habitat. *Id.*

6 66. In a Letter dated July 26, 2001, FWS concurred in IPNF’s “not likely
7 to adversely affect” determination. 2001 LOC.

8 67. Until 2005, FS and/or FWS never analyzed, in any document
9 prepared pursuant to Section 7 of the ESA, the environmental consequences of
10 helicopter logging in core habitat on the struggling population of grizzly bears in
11 the Selkirk Recovery Area, and never engaged in formal consultation with each
12 other in order to ensure that such activities will not jeopardize the Selkirk grizzly
13 bear population’s continued existence. *See generally* 2005 Amended BA; 2005
14 LOC.

15 68. Meanwhile, FWS required IPNF to engage in formal consultation to
16 evaluate the effects of *other* BlueGrass Bound activities, including road
17 decommissioning and/or road obliteration, due to concern that bears would be
18 displaced by these activities in their core habitat. *See generally* 2004 BiOp; *id.* at
19 20.

20 **D. The 2005 Amended BA, FWS’s Concurrence, and Recent Developments**

21 69. In November 2005, IPNF prepared yet another – and, so far, the most
22 recent – Amended Biological Assessment to consider the impacts of remaining
23 logging pursuant to the BlueGrass Bound EA and Decision Notice. 2005
24 Amended BA. IPNF prepared this Amended BA in order to consider the effects of
25 combining two of the timber sales considered in the BlueGrass Bound EA into a
26 single sale – *i.e.*, the Boundary Timber Sale. *Id.*

27 70. The Boundary Timber Sale involves a sale area of approximately
28

1 2,384 acres, 1,242 acres of which will be logged. The sale area lies in the
2 BlueGrass BMU in the Selkirk Grizzly Bear Recovery Area. The sale will remove
3 about 15 million board feet (“MMBF”) of timber from 14 units. Amended BA at
4 11. Approximately 970 of these acres will be helicopter logged, or about 10
5 MMBF.

6 71. In the 2005 Amended BA – *for the first time* – IPNF considered the
7 effects of helicopter logging in core grizzly bear habitat in the lower Boundary
8 Creek drainage, and specifically noted that proposed logging activities – including
9 helicopter logging – *will* affect grizzly bear use of core habitat. *Id.* In IPNF’s
10 words, “[h]elicopter logging in the lower Boundary Creek drainage will likely
11 influence grizzly bear use of this area.” *Id.*

12 72. Nevertheless, IPNF concluded that helicopter logging in the
13 BlueGrass BMU would not likely “*adversely*” affect grizzly bears – and, in
14 reaching this conclusion, excused itself from engaging in formal consultation with
15 FWS pursuant to Section 7(a)(2) of the ESA.

16 73. IPNF based its “no adverse effects” determination on four rationale:
17 (1) that helicopter logging will take place during different years, and, thus, (2) that
18 “[t]here will be adequate habitat adjacent to harvest units for displaced bears to
19 utilize”; (3) that the area impacted – although core grizzly bear habitat – will
20 “likely have limited value to grizzly bears, particularly in summer”; and (4) that
21 core had increased from 45 to 51 percent in 2005. *Id.*

22 74. By letter dated November 30, 2005, FWS concurred with IPNF’s “not
23 likely to adversely affect” determination. Letter from FWS to Ranotta McNair,
24 IPNF Forest Supervisor (Nov. 30, 2005).

25 75. By letter dated January 10, 2006, AWR notified defendants of its
26 intent to sue over the Boundary Timber Sale for violations of Section 7 and
27 Section 9 of the ESA. *See* Letter from Michael Garrity, Executive Director ,
28

1 Alliance for the Wild Rockies (Jan. 10, 2006) (Exhibit A).

2 76. By letter dated February 4, 2006, Ranotta McNair, IPNF Supervisor,
3 responded to AWR's notice of intent to sue, and further explained IPNF's view
4 that helicopter logging would not adversely affect grizzly bears or their core
5 habitat. According to Sup. McNair, since "[i]dentification of core habitat is based
6 on the presence of linear features" such as roads, railroads, and motorized trails,
7 "[t]he IGBC definition of logging and/or helicopter logging would not result in
8 core loss." *Id.* at 7. Supervisor McNair also opined that impacts to grizzly bears
9 or their core habitat would be temporary, and "will take place during different
10 years," and, thus, "bears would be free from helicopter overflights in the portion of
11 the drainage not actively being logged." *Id.*; *see also id.* ("By limiting these
12 activities to a three year period with discrete operating periods for the two areas,
13 there would not be continuous disturbance of any given area for three years or
14 more that could result in core loss.").

15 77. According to the "plan of operations" for the Boundary Timber Sale –
16 and contrary to IPNF's claim that the planned activities will not displace grizzly
17 bears because they will take place over three years – the timber company operator
18 plans to harvest "all volume" during the summer/fall 2006 season. *See* Letter from
19 Tim Dougherty to Dave Faulkner (June 21, 2006).

20 Summary of Facts

21 78. In summary, while defendants have generated numerous documents
22 purporting to analyze the environmental effects of the BlueGrass Bound Project
23 and Boundary Timber Sale, defendants have never engaged in formal consultation
24 pursuant to Section 7 of the ESA, never prepared a Biological Opinion that
25 analyzes the impacts of helicopter logging, and have never taken the steps
26 necessary to ensure that the continued existence of the Selkirk population of
27 grizzly bears is not jeopardized by Boundary Timber Sale activities. Nor have

1 defendants obtained an Incidental Take Statement (“ITS”) for these helicopter
2 logging activities, as required by Section 9 of the ESA, to ensure that no unlawful
3 “take” of grizzly bears will result from these activities.

4 **FIRST CLAIM FOR RELIEF**

5 **Section 7(a)(1) of the ESA – Failure to Carry Out Agency Programs in**
6 **Furtherance of the Conservation of Grizzly Bears in the Selkirk Ecosystem**

7 79. Plaintiff repeats and incorporates by reference the foregoing
8 paragraphs.

9 80. Pursuant to section 7(a)(1) of the ESA, all federal agencies must, “in
10 consultation with and with the assistance of” FWS, “utilize their authorities in
11 furtherance of [the ESA] . . . by carrying out programs for the conservation of
12 endangered and threatened species.” 16 U.S.C. § 1536(a)(1).

13 81. The term “conservation” is defined in the ESA as the “use of all
14 methods and procedures which are necessary to bring any endangered species or
15 threatened species to the point at which the measures provided by [the ESA] . . .
16 are no longer necessary.” 16 U.S.C. § 1532(3).

17 82. By approving plans for helicopter logging pursuant to the Boundary
18 Timber Sale to proceed in sub-standard core grizzly bear habitat, without first
19 ensuring these activities will not jeopardize the continued existence of the Selkirk
20 grizzly bear population, defendants have failed, and continue to fail, to utilize their
21 authority to carry out programs for the conservation of grizzly bears in the Selkirk
22 Recovery Zone.

23 83. Defendants’ constitutes “agency action unlawfully withheld or
24 unreasonably delayed” and is “arbitrary and capricious, an abuse of discretion, and
25 not in accordance with law.” 5 U.S.C. §§ 706(1), 706(2)(A).

1 **SECOND CLAIM FOR RELIEF**

2 **Section 7(a)(2) of the ESA – Failure to Ensure that Helicopter Logging Will**
3 **Not Jeopardize the Continued Existence of the**
4 **Selkirk Population of Grizzly Bears**

5 84. Plaintiff repeats and incorporates by reference the foregoing
6 paragraphs.

7 85. Pursuant to Section 7(a)(2) of the ESA, all federal agencies, including
8 the Forest Service, “shall, in consultation with and with the assistance of the
9 [FWS], insure that any action authorized, funded, or carried out by such agency . .
10 . is not likely to jeopardize the continued existence of any endangered or
11 threatened species.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

12 86. In fulfilling the requirements of Section 7(a)(2), “each agency shall
13 use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2); 50
14 C.F.R. § 402.14(d).

15 87. The phrase “jeopardize the continued existence of” means to “engage
16 in action that reasonably would be expected, directly or indirectly, to reduce
17 appreciably the likelihood of both the survival and recovery of a listed species in
18 the wild by reducing the reproduction, numbers, or distribution of that species.”
19 50 C.F.R. § 402.2

20 88. IPNF is refusing to engage in formal consultation with FWS to ensure
21 that the Boundary Timber Sale is not likely to jeopardize the continued existence
22 of the Selkirk population of grizzly bears. 16 U.S.C. § 1536(a)(2).

23 89. IPNF is also refusing, and continues to fail, to use the best scientific
24 and commercial data available to ensure that its actions are not likely to jeopardize
25 the continued existence of the Selkirk population of grizzly bears. 16 U.S.C. §
26 1536(a)(2).

27 90. IPNF’s refusal to engage formal consultation to ensure that the
28 Boundary Timber Sale activities, including helicopter logging, are not likely to

1 jeopardize the continued existence of the Selkirk population of grizzly bears, and
2 to use the best scientific and commercial data, constitutes “agency action
3 unlawfully withheld or unreasonably delayed” and is “arbitrary and capricious, an
4 abuse of discretion, and not in accordance with law.” 5 U.S.C. §§ 706(1),
5 706(2)(A).

6 THIRD CLAIM FOR RELIEF

7 APA – Arbitrary and Capricious Conclusion that Boundary Timber Sale 8 Activities Will Not Adversely Affect the Selkirk Population of Grizzly Bears

9 91. Plaintiff repeats and incorporates by reference the foregoing
10 paragraphs.

11 92. IPNF’s determination, in the 2001 Amended BA and 2005 Amended
12 BA, that Boundary Timber Sale activities – including helicopter logging in core
13 grizzly bear habitat – is not likely to adversely affect the Selkirk population of
14 grizzly bears is arbitrary, capricious, an abuse of discretion, and not in accordance
15 with law, within the meaning of Section 706(2) of the APA.

16 FOURTH CLAIM FOR RELIEF

17 Section 7 of the ESA – Failure to Comply with the Terms and Conditions 18 of the 2001 BiOp

19 93. Plaintiff repeats and incorporates by reference the foregoing
20 paragraphs.

21 94. By allowing the Boundary Timber Sale to proceed without first
22 ensuring that the Blue Grass BMU had a “minimum core area” of 52 percent by
23 March 31, 2004, as required by the terms and conditions of the 2001 BiOp, FWS’s
24 determination that Boundary Timber Sale activities will not adversely affect the
25 Selkirk population of grizzly bears is a violation of Section 7 of the ESA, and is
26 “arbitrary and capricious, an abuse of discretion, and not in accordance with law.”
27 5 U.S.C. § 706 (2)(A).

1 **FIFTH CLAIM FOR RELIEF**

2 **Section 9 of the ESA – Unlawful Take of Grizzly Bears**

3 95. Plaintiff repeats and incorporates by reference the foregoing
4 paragraphs.

5 96. By proceeding with Boundary Timber Sale activities without first
6 ensuring that these activities, including helicopter logging, will not jeopardize the
7 continued existence of grizzly bears in the Selkirk Ecosystem, and without
8 obtaining an ITS from FWS that specifies the form of, and quantifies any
9 allowable amount, take of Selkirk grizzly bears, FWS is in violation of Section 9
10 of the ESA, which prohibits the unauthorized take of listed species. IPNF’s
11 actions are therefore arbitrary, capricious, an abuse of discretion, and not in
12 accordance with Section 9 of the ESA.

13 **SIXTH CLAIM FOR RELIEF**

14 **APA – Arbitrary and Capricious Concurrences in IPNF NLAA**
15 **Determinations**

16 97. Plaintiff repeats and incorporates by reference the foregoing
17 paragraphs.

18 98. FWS’s 2001 and 2005 concurrences with IPNF determinations that
19 helicopter logging will not adversely affect grizzlies in core habitat, and, thus, that
20 IPNF is not required to engage in formal consultation on the adverse effects of
21 Boundary Timber Sale helicopter logging activities on the Selkirk population of
22 grizzly bears, are “arbitrary and capricious, an abuse of discretion, and not in
23 accordance with law.” 5 U.S.C. § 706 (2)(A).

24 **PRAYER FOR RELIEF**

25 99. Plaintiff repeats and incorporates by reference the allegations of all
26 foregoing paragraphs.

27 100. WHEREFORE, plaintiff respectfully requests that this Court grant the

1 following relief:

- 2 A. Issue a declaratory judgment that defendants’ actions and inactions,
3 as alleged above, have violated, and continue to violate, the ESA;
- 4 B. Issue declaratory judgment that defendants’ actions or inactions, as
5 alleged above, constitute agency action unlawfully withheld or
6 unreasonably delayed, or is arbitrary, capricious, an abuse of
7 discretion, or otherwise not in accordance with law, under the APA;
- 8 C. Issue a mandatory injunction requiring defendants to initiate and
9 complete formal consultation pursuant to Section 7 of the ESA on the
10 impacts of the Boundary Timber Sale on grizzly bears in the Selkirk
11 Recovery Zone;
- 12 E. Issue a mandatory injunction prohibiting IPNF from funding,
13 authorizing, and/or carrying out any activities or site-specific projects
14 that may adversely impact the Selkirk population of grizzly bears,
15 until all violations of law complained of herein are remedied;
- 16 F. Issue such injunctive relief as plaintiff may subsequently request or
17 that this Court may deem appropriate;
- 18 G. Retain continuing jurisdiction of this matter until defendants fully
19 remedy the violations of law complained of herein;
- 20 H. Grant plaintiff its costs and expenses of litigation, including
21 reasonable attorneys’ fees for claims brought under the ESA, pursuant
22 to 16 U.S.C. § 1540(g), and/or the APA, pursuant to the Equal Access
23 to Justice Act (“EAJA”), 28 U.S.C § 2412;
- 24 J. Grant such other relief as this Court deems just and proper.
- 25
26
27
28

1 Respectfully submitted, this 3rd day of July,
2 2006,

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20 Local Counsel for Plaintiff

January 10, 2006

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RE: Notice of Intent to Sue (NOIS)

Dear Secretary Johanns, Secretary Norton, Chief Bosworth, Supervisor McNair and Ms. Martin:

On behalf of the Alliance for the Wild Rockies, we are writing to inform you that, unless the problems discussed below are remedied within 60 days, we intend to challenge in federal court the United States Forest Service's decision to sell the Boundary timber sale and the US Fish and Wildlife's concurrence with the findings in the Forest Service Amended Biological Assessment for the Boundary project. This suit will allege violations of the Endangered Species Act (ESA), 16 U.S.C. § 1531 et. seq. as well as other statutes. Implementation of the Boundary timber sale would adversely impact grizzly bears and

therefore be inconsistent with the Forest Service's obligations under the ESA. Moreover, the Forest Service's decision to proceed with these activities flies in the face of evidence that they will have significant and unlawful impacts on grizzlies and their habitats. The Boundary timber sale is located in the Bonners Ferry District, on the Idaho Panhandle National Forest.

We urge the Forest Service to withdraw the Boundary timber sale and/or void the contract if it has been awarded by the time this NOIS is received. This is necessary in order for the Forest Service to conform the management of the forest to the biological parameters necessary to ensure the survival and recovery of grizzly bears in the Selkirk ecosystem. Pursuant to 16 U.S.C. Section 1540(g), this letter constitutes the notice required prior to initiating litigation under the ESA.

BACKGROUND

Congress enacted the ESA for the express purpose of providing a "means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species..." 16 U.S.C. Section 1531(b). Section 7(a)(2) of the ESA requires all federal agencies to insure that any action an agency authorizes, funds, or carries out is not likely to jeopardize the continued existence of any threatened or endangered species nor result in the adverse modification of the critical habitat of such species. 16 U.S.C. Section 1536(a)(2). To effectuate the ESA's duty to avoid jeopardy and adverse modification, the ESA directs an agency proposing an action (action agency) to consult with the U.S. Fish and Wildlife Service (FWS) (the expert agency).

The ESA prohibits all persons, including federal agencies, from "taking" endangered species; this ban also applies by regulation to threatened species. See 16 U.S.C. Section 1538(a)(B); 50 C.F.R. Section 17.31(a). The ESA and its implementing regulations define "take" to include habitat degradation that results in harm as well as the actual death or injury of protected species. See 16 U.S.C. Section 1538(18); 50 C.F.R. Section 17.3 (definition of harm).

The grizzly bear population in the Selkirk Ecosystem (SE) is critically endangered. Only 40-50 bears likely still inhabit the SE (Wakkinen and Kasworm, 2004); these numbers are far below the recovery goal of 90 in the SE. Although the results of the most recent SE grizzly population trend analysis were "inconclusive," there is strong evidence that the population may be in decline.

Roads have been recognized as a primary cause of grizzly mortality. Roads fragment and degrade habitat and reduce or eliminate security needed by bears by facilitating human access to bear country that often results in bear-human conflicts. FWS cited these impacts as primary reasons for its 1999 finding that the status of the SE grizzly population should be changed from "threatened" to "endangered" under the ESA (64 Fed. Reg. 26725 (1999)). Aside from vehicular travel on roads, disturbance from mechanized human activities within secure habitat is likely to "displace" or drive bears from areas where they are relatively safe.

Implicit in the definition of secure habitat or “core” is the absence of disturbance from major human actions such as helicopter logging.¹

The Boundary timber sale is located on the Canadian border in the Bluegrass Bear Management Unit (Bluegrass BMU) of the Selkirk Grizzly Bear Recovery Zone (SRZ). The SRZ is located in northern Idaho, eastern Washington and southern British Columbia. The Bluegrass BMU is one of two BMUs that border Canada in the US portion of the SRZ. This BMU has had more grizzly bear sightings than any other BMU in the SRZ. It is the most utilized and therefore most critical BMU in the Selkirk system for grizzly bear recovery.

In recent years the Selkirk grizzly population has suffered human-caused mortalities far in excess of levels that will allow grizzly numbers to stabilize and increase. High road densities in the SRZ are a major cause of high bear mortality rates. The lack of large, secure, undisturbed core habitat areas (core) in the SRZ is another factor that has affected the ability of the population to recover. The Bluegrass BMU does not meet the minimum core criterion (55%) established for it in the Motorized Access Management Forest Plan Amendment within the Selkirk and Cabinet Yaak Grizzly Bear Recovery Zones, adopted by the Idaho Panhandle NF in 2004. The minimum core criterion is a threshold, below which the US Fish and Wildlife Service has determined there is ‘take.’ Currently, only 51% of the Bluegrass BMU meets the definition for core. High road densities and low availability of core habitat coupled with extensive disturbance from logging and other ongoing activities in the Bluegrass BMU have displaced bears from preferred habitats for many years, causing harm.

A Decision Notice was issued for the Bluegrass Bound Project in 1999. That decision included the units now planned to be sold as the ‘Boundary’ timber sale. Other units in the decision have been harvested under different timber sale names during the last 5 years. One of the previous sales is not yet complete and will be active concurrently with the Boundary timber sale. The Bluegrass Bound Project decision also included 97 miles of road decommissioning, some of which was in core habitat. Approximately 70 miles of road decommissioning has been completed. Many of the old roads scheduled for decommissioning were re-vegetated and therefore were not considered in the total road density calculation prior to decommissioning. As a result of the decommissioning core habitat was increased in the BMU from 45% in 1999 to 51% in 2005, according to the Forest Service’s November 16, 2005 Amended Biological Assessment for the Bluegrass Bound project.

In 1999, the FWS issued a biological Opinion (“BiOp”) for the Bluegrass Bound Project which also included 2 additional activities under separate decisions: an existing permit for livestock grazing in the Bluegrass BMU and the obliteration of the Boundary Creek Road.

1. Three criteria have been established by the Interagency Grizzly Bear Committee (IGBC) as a means of determining whether enough habitat security exists within grizzly bear recovery zones to ensure recovery of the species. The criteria apply to grizzly Bear Management Units (BMUs) within each recovery zone. The criteria include Open Motorized Road Density (OMRD), Total Motorized Road Density (TMRD) and “core.” Core has been defined as areas 500 meters from open or ineffectively closed (gated) roads and trails, that ideally contain all seasonal habitats (spring, summer, fall and denning). The purpose of core is to provide undisturbed areas safe from human intrusion that contain adequate seasonal forage, and that are large enough to provide adequate habitat for reproducing females and that remain in place long enough for cubs to survive and reproduce.

The finding in the BiOp was that the combined activities, especially road obliteration in core habitat would result in adverse impacts to grizzly bears but were not likely to jeopardize the continued existence of the species. The FS was required to re-initiate consultation regarding specific road obliteration projects. Additional consultation took place in 2001 when the lynx was listed and in 2004 to address road obliteration that would adversely affect bears due to its relatively short term impacts on core. Consultation on the timber sale portion of the project was re-visited recently due to the inclusion of temporary road construction in the Boundary timber sale project.

On November 16, 2005 the FS issued an Amended Biological Assessment (Amended BA) for the Bluegrass Bound project, which specifically addresses the Boundary timber sale. On November 30, 2005, FWS issued a letter (LOC) concurring with the Amended BA's finding that the Boundary project "may affect, but is not likely to adversely affect" grizzly bears.

The Boundary timber sale plan includes opening several closed roads to access the timber sale units. It also includes reconstruction of 37.51 miles of road for hauling, construction of <1 mile of temporary road and over 900 acres of helicopter logging.

According to the Boundary project sale package, there are eight units totaling 966 acres that will be logged by helicopter during active (non-denning) bear seasons over at least three consecutive years. With the exception of a few acres, all of the helicopter units are located in currently designated grizzly bear core area in the Bluegrass BMU. Approximately 2/3 of the total volume (10 million board feet (MMBF)) of the timber harvested will be transported (yarded) by helicopter.

ESA VIOLATIONS

The impacts of the disturbance from planned helicopter logging on grizzly bears and core habitat in the Bluegrass Bear Management Unit (BMU) were not addressed by the Forest Service in the November 16, 2005 Amended Biological Assessment for the project or by the FWS in its November 30th letter of concurrence (USFWS.2005)

It has been well documented that the disturbance from helicopter logging displaces grizzly bears. Displacing them from core habitat constitutes a "take" of grizzlies, as defined in section 9 of the ESA. The Bluegrass Bound BMU is currently deficient in core due to ongoing timber sales and other activities within the BMU. The importance of the Bluegrass BMU to recovery of the highly imperiled Selkirk grizzly population and the likelihood that the helicopter logging will displace bears from core were not considered by the Forest Service in its finding of 'not likely to adversely affect' or by the FWS in its concurrence with that finding.

The helicopter logging will reduce or eliminate bear use of the core habitat impacted by the low flying loud machines, thus reducing the already deficient amount of core habitat that exists in the Bluegrass BMU for three years or longer.

This state of affairs violates the Forest Service’s duties under the ESA to avoid taking actions likely to jeopardize the continued existence of bears, as well as the Act’s mandate that federal agencies use the best scientific data available in carrying out their responsibilities under the ESA.

Finally, the Forest Service and the FWS have failed to develop “a strategy [to address the impacts of] point source disturbances (e.g., helicopter logging, mining, etc.)” on bears, as recommended in the FWS’s 2004 Biological Opinion for the Motorized Access Amendments. USFWS 2004 at 140. Clearly standards that reflect the adverse effects on core habitat from point sources such as helicopter logging need to be developed. The Forest Service and the FWS have avoided establishing such standards. In the meantime the agencies cannot pretend that three years of high level disturbance from helicopter logging in core will not reduce the amount of core that is available in the Bluegrass BMU or affect bears that may have learned to use that secure area.

1. The Forest Service and FWS’s conclusions that the Boundary Project is ‘not likely to adversely affect’ the threatened grizzly bear is arbitrary because the level of incidental take of grizzly bears the agency was estimated without consideration of ongoing take since 1999 within the Bluegrass BMU; without consideration of ongoing take of grizzly bears throughout the SRZ; and without consideration of the ongoing high mortality rate of grizzly bears in the SRZ.

The FWS recognizes that grizzly bears are currently being adversely impacted by the existing high Total Motorized Road Density (“TMRD”) and low secure core habitat in the Bluegrass BMU. TMRD exceeds criterion established in the Access Management Amendment and core habitat is currently below the amount necessary to provide adequate secure habitat for bears and avoid take. The Bluegrass BMU therefore currently has a degraded condition for grizzly bears.

It is possible that the current level of take due to high total road densities and insufficient core habitat is already affecting conservation and recovery of the grizzly bear in the Bluegrass BMU of the SRZ. This potential problem has to be factored in with any decisions to allow additional take of grizzly bears. However, the FWS arbitrarily proceeded to allow additional take of grizzly bears as a result of the Boundary timber sale. The total amount of take that can occur in this BMU and still achieve conservation and recovery of the SE grizzly bears is unknown and was ignored in the decision to allow additional take.

Both the FWS and the Forest Service also failed to consider the combined and ongoing take of grizzly bears within the Selkirk recovery zone when making their decisions to increase taking of grizzly bears within the Bluegrass BMU. There are many other agency actions ongoing throughout the SRZ that are currently having negative impacts on grizzly bears. Yet nothing in the Forest Service’s analysis of the Bluegrass Bound or Boundary projects considered the direct, indirect or cumulative effects of other actions on SRZ grizzly bears. Without such an analysis, neither agency has a way of knowing whether the current

level of take of bears within the SRZ exceeds a level that would result in 'jeopardy.' Thus the impact of additional take on bears from implementation of the Boundary project is unknown.

The agencies' failure to address the cumulative take of grizzly bears in the SRZ when evaluating the Boundary project's impacts is arbitrary, given that the trend analysis for this population is inconclusive and given the high number of known mortalities. Data on grizzly bear mortalities in the SRZ over the past 18 years shows an alarming number of human-caused grizzly mortalities.

2. The Forest Service's conclusion and the FWS's concurrence that the Boundary timber sale is 'not likely to adversely affect' grizzly bears is arbitrary and failed to meet the requirements of the ESA; the increase in take due to impacts on core habitat from helicopter logging and the increase in OMRD levels were downplayed and basically ignored by both agencies.

Displacement away from human activities has been documented to disrupt normal grizzly bear behavior patterns and reduce fitness of bears, which can affect reproductive success and cub survival. Even if there is no immediate direct mortality as a result of displacement, the short and long term impacts on the small SE population are likely to postpone if not eliminate the possibility of recovery.

The Amended Biological Assessment for the Boundary project acknowledges that helicopter activity does disturb grizzly bears, and that displacement has a negative impact on bears and their survival. However, the impacts of three consecutive years of disturbance from helicopter logging in core is written off partly because of the "limited value" of the particular type of habitat in the affected core. The Forest Service also states that mandatory timing will reduce the impacts because the helicopter logging in various units in the affected core area will take place in different years. The Amended BA also argues that since new core has been created in the BMU through road decommissioning included in the original decision, that the impacts to the newly created core are acceptable. These conclusions are arbitrary and capricious and will result in violations of the ESA.

There is no question that helicopter logging will disturb and displace grizzly bears. The noise of helicopters is similar to, or louder than other vehicle noise, or noises the FWS acknowledges disturb and displace grizzly bears from secure habitat. In fact, such disturbance reduces security. The FWS has noted that repeated low-level helicopter flights (under 1500 feet) will disturb grizzly bears. USFWS 2004a, Biological Opinion for the Snow Talon Fire Salvage Project, p. 29. The logging will require constant low-elevation helicopter flights for three years during the summer and fall, when bears are active, in order to transport 10 MMBF of timber. The noise from the helicopters will reverberate throughout the Boundary Creek canyon for three or more consecutive active bear seasons.

Due to the widespread nature of the summer-fall helicopter logging activities, the displacement impacts on grizzly bears may be extensive. The Forest Service and the FWS have failed to consider these adverse impacts in the context of "take" and the long term

survival of the Selkirk grizzly population.

The Forest Service relies on an interpretation of the IGBC definition of “core” to avoid addressing the loss of secure core habitat due to helicopter logging. The Amended BA states that the “IPNF and the USFWS have made a distinction between impacts to core and loss of core. Identification of core habitat is based on the presence of linear features (drivable roads, railroads and motorized trails). Therefore, by IGBC definition, logging and/or helicopter (sic) would not necessarily result in core loss.”

The agency decisions to ignore displacement impacts from helicopter logging simply because the latter is not included in the IGBC definition of core is arbitrary, capricious and in violation of the ESA. The ESA requires that the best available science be used for managing the habitat of listed species. Impacts cannot be ignored simply because there is no current policy regarding how to measure such impacts.

3. The FWS and the Forest Service have failed to provide reasonable and prudent alternatives for the Boundary project, alternatives that would simply maintain or increase the current level of grizzly bear core habitat in the Bluegrass BMU.

As stated above, the Bluegrass BMU is already deficient in core habitat. This fact alone should have prompted the agencies to consider alternatives that would avoid the obvious impacts to the already sub-standard core in this important BMU.

CONCLUSION

The Forest Service’s decision to approve and implement the Boundary timber sale violates the ESA in many ways. The FWS’ concurrence suffers from any of the same errors as detailed above. An action agency, in this case the Forest Service, bears an independent responsibility for complying with its duties under the ESA, and cannot rely upon an invalid determination from the FWS to shield it from ESA liability. Until the Forest Service remedies the ESA violations discussed above, the agency stands in violation of the ESA. Accordingly, we urge the Forest Service to halt implementation of the Boundary project until the agency fully complies with the ESA. We hope that the Forest Service will act expeditiously to remedy the legal shortcomings described in this letter.

Sincerely,

Michael Garrity
Executive Director,
Alliance for the Wild Rockies

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