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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

NATIVE ECOSYSTEMS COUNCIL and	)	
THE ALLIANCE FOR THE WILD	)	
ROCKIES,	)	Case No. CV-08-134
Plaintiffs,	)	
vs.	)	COMPLAINT FOR DECLARATORY
	)	AND INJUNCTIVE RELIEF
ABAGAIL KIMBELL, in her official capacity	)	
as Chief of the U.S. Forest Service; JERRY	)	
REESE, in his official capacity as Forest	)	
Supervisor for the Caribou-Targhee National	)	
Forest; and, the UNITED STATES FOREST	)	
SERVICE, an agency of the U.S. Department	)	
of Agriculture,	)	
Defendants.	)	

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**INTRODUCTION**

1. This case is a continuation of the dispute over the adequacy of the Targhee National Forest Revised Forest Plan (“RFP”) initially heard and decided in this Court in the case of *Native Ecosystems Council et al. v. Bosworth*, CV-04-367-E-BLW. That case found the old-growth provisions in the RFP invalid, due in part to the failure to consider the habitat relationship between old-growth and obligate species viability. For similar reasons, this case challenges the sagebrush habitat provisions of the RFP.

2. This is a civil action for judicial review under the Administrative Procedure Act, *infra.*, of the final decisions approving implementation of the Targhee National Forest's Revised Forest Plan (hereinafter, "RFP") generally, and specifically the Berry Creek Prescribed Burn, pursuant to the RFP. While the Caribou and Targhee National Forests were subsequently combined into one unit of the USFS National Forests System, they are still governed by separate forest plans. Plaintiffs allege that the challenged decisions are arbitrary and capricious, an abuse of discretion, and/or otherwise not in compliance with the law. They seek declaratory and injunctive relief to mitigate, redress, or avoid irreparable injury to the environment and their interests under the law.

3. If plaintiffs prevail, plaintiffs will seek an award of costs and attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

### **JURISDICTION**

4. This action arises under the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq.*; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*; and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, as more fully set forth below. This Court has jurisdiction by reason of 28 U.S.C. §§ 1331, 1346 because this action involves the United States as defendant and arises under the laws of the United States.

5. An actual, justiciable controversy exists between plaintiffs and defendants. Plaintiffs' members use and enjoy Targhee National Forest, for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiffs' members intend to continue to use and enjoy affected area frequently and on an ongoing basis in the future.

6. The aesthetic, recreational, scientific, spiritual, and educational interests of plaintiffs' members have been and will be adversely affected and irreparably injured if defendants are allowed to continue implementing the RFP as approved, and as proposed in the challenged project. These are actual, concrete injuries caused by defendants' failure to comply with mandatory duties under NFMA and NEPA. The requested relief would redress these injuries and this Court has the authority to grant plaintiffs' requested relief under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 & 706.

7. The plaintiffs and their members submitted extensive, written comments concerning the RFP and/or the proposed timber sales, and have exhausted all available administrative remedies without relief. Defendants have declared that the Record of Decisions for the RFP and the challenged project are the final administrative determinations of the Department of Agriculture.

8. Based upon information and belief, burning activities approved by the Berry Creek Prescribed Burn are imminent as of the date of filing this Complaint. The challenged agency actions are final and subject to this Court's review under 5 U.S.C. §§ 702, 704, and 706.

#### VENUE

9. The Berry Creek Prescribed Burn is located in the Targhee National Forest in Idaho.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

11. This case is a continuation of the dispute over the adequacy of the Targhee National Forest initially heard and decided in this Court in the case *Native Ecosystems Council et al. v. Bosworth*, CV-04-367-E-BLW.

## PARTIES

12. Plaintiff NATIVE ECOSYSTEMS COUNCIL is a nonprofit Montana-based organization, headquartered in Three Forks, with an interest in protecting native ecosystems on public lands in the Northern Rockies. Native Ecosystems Council actively and extensively participates in agency proceedings and decisions concerning the management of National Forests in the Northern Rockies, including the Caribou-Targhee National Forest, and its executive director formerly worked for the Targhee National Forest, is familiar with the area of the challenged project, and has actually done scientific studies in that area of concerns relevant to this litigation. She has visited the area many times, and has every intention to continue visiting it in the future.

13. Plaintiff ALLIANCE FOR THE WILD ROCKIES is a tax-exempt, non-profit public interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and its naturally functioning ecosystems. Its registered office is located in Helena, Montana. The Alliance has over 2,000 individual members, many of whom reside in Montana, and more than 600 member businesses and organizations, many of which are located in Idaho. Members of the Alliance work as fishing guides, outfitters, and researchers who are directly affected by the failure of the Defendants to take the steps required by law to protect and conserve these ecosystems. Members also observe, enjoy and appreciate Idaho's native wildlife and the water quality of aquatic ecosystems in Idaho's lakes and streams, as well as the habitat quality of terrestrial ecosystems upon which they depend, and expect to continue to do so in the future, including in the Targhee National Forest.

14. Members also observe, enjoy and appreciate the Northern Rockies' native wildlife and the water quality of aquatic ecosystems in the bioregion's lakes and streams, as well as the habitat quality of terrestrial ecosystems upon which they depend, and expect to continue to do so in the future, including in the Caribou-Targhee National Forest.

15. Defendant ABAGAIL KIMBELL is the Chief of the U.S. Forest Service. In that capacity, she is the responsible official for the final approval of the Targhee National Forest's Revised Forest Plan, and is responsible generally for ensuring that projects and forest planning processes comply with the laws relating to management of public resources on the U.S. National Forests. She is being sued in her official capacity.

16. Defendant JERRY REESE is the Supervisor for the Caribou-Targhee National Forest, responsible for obtaining and maintaining appropriate information for managing the forest in accordance with law, and keeping the Forest Plan current, and is being sued in his official capacity.

17. Defendant UNITED STATES FOREST SERVICE is an agency of the United States Department of Agriculture, and is primarily responsible for the lawful management of our national forests, including the Caribou-Targhee National Forest.

### **SUMMARY OF FACTS AND GENERAL ALLEGATIONS**

18. The RFP was approved in 1997 by then Regional Forester Dale Bosworth. Thus, it is controlled by the 1982 NFMA Planning Regulations.<sup>1</sup>

19. The National Forest Management Act (NFMA) imposes a substantive duty on the Forest Service to "provide for diversity of plant and animal species." 16 U.S.C. §

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<sup>1</sup> In addition, both the approved 2000 and 2005 NFMA regulations promulgated to replace the 1982 regulations have been found by the courts to be without effect, due to failure to comply with NEPA.

1604(g)(3)(B). Regulations promulgated to ensure such diversity mandate that fish and wildlife habitat be managed to maintain viable populations and the diversity of species throughout the planning area. 36 C.F.R. §§ 219.19, 219.27.

20. In accord with 16 U.S.C. 1604(g), which requires the promulgation of regulations that “provide for diversity of plant and animal communities” in the development and revision of Forest Plans, the 1982 regulations implementing NFMA provided specific direction concerning species viability at 26 C.F.R. 219.19:

Fish and wildlife habitat *shall be* managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals *to insure* its continued existence is *well distributed* in the planning area. In order to insure that viable populations will be maintained, habitat must be provided to support, *at least*, a minimum number of reproductive individuals and that habitat must be well distributed *so that those individuals can interact with others in the planning area.*

(emphasis added).

21. According to official Forest Service policy interpreting the 1982 regulations on viability, “well distributed” as used in NFMA means “a population’s *unceasing presence* ‘throughout its existing range in the planning area’ (*Hilmon 1982*).” (emphasis added) USDA 1983 (“Wildlife Resource Planning Assistance To the Payette and Boise National Forests,” Rocky Mountain Research Center, USFS).

22. In order to estimate impacts of management activities on fish and wildlife populations and diversity, certain species must be identified as “management indicator species” (“MIS”) for the various biological communities represented on the forest. 36 C.F.R. § 219.19. Management alternatives are to be evaluated in terms of the quality of habitat and the population trends of the MIS. Id.

23. The regulations go on to require that viability be insured through the utilization of quantitative inventory analysis:

Forest planning shall provide for diversity of plant and animal communities and tree species consistent with the overall multiple-use objectives of the planning area. Such diversity shall be considered throughout the planning process. *Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition.* For each planning alternative, the interdisciplinary team shall consider how diversity will be affected by various mixes of resource outputs and uses, including proposed management practices.

(emphasis added) 36 C.F.R. 219.26. This requirement for insuring species viability with quantitative data is in accord with the NFMA requirement for “continuous monitoring and assessment,” 16 U.S.C. 1604(g)(3)(C), as well as the Forest Supervisor’s duty to “obtain and keep current inventory data appropriate for planning and managing” the forest’s resources. 36 C.F.R. 212(d).

24. “USDA Forest Service defines sensitive species as those plant and animal species identified by a regional forester for which population viability is a concern, as evidenced by *significant current or predicted downward trends in population numbers or density, or significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution.*” (emphasis added, excerpted from USFS Official Website).

25. According to the FS’s own experts, “[p]opulation viability analysis is not plausible or logical at the project level,” and must instead be conducted in the first instance at a range-wide, forest-wide, or broad-scale landscape level.

26. As a matter of science and logic, it is not possible to assess the impacts of habitat reduction on species viability without first knowing whether the species at issue is viable throughout its range in the forest at issue.

27. According to official FS policy, the TNF “must develop conservation strategies for those sensitive species whose continued existence may be negatively affected by the forest plan or a proposed project.” FSM 2670.45. These strategies must contain quantifiable objectives, and must be adopted prior to implementation of projects that would adversely impact that species habitat. FSM 2622.01, 2670.45.

28. In May of 2000, the Forest Service dismissed the appeals of the RFP by a number of participants, including but not limited to Plaintiff NEC. Based upon the U.S. Supreme Court’s decision in *Ohio Forestry v. Sierra Club*, 523 U.S. 726 (1998), challenges to a Forest Plan promulgated under NFMA must be brought in the context of site-specific decisions implementing that plan. This lawsuit challenged the inadequacies of the RFP in the context of site-specific decisions affecting forest-wide issues of concern over forest plan implementation.

29. One of the primary concerns of Plaintiffs is that the RFP substitutes discretionary, voluntary “guidelines” and “goals” for what the previous forest plan required as mandatory and measurable “standards.”

30. The RFP defines “Standard” as “a condition of land, normally a maximum or minimum condition, that is measurable. A standard can also be expressed as a constraint on management activities or practices... Deviation from compliance with a standard requires a Forest Plan amendment...” RFP III-2.

31. The RFP defines “Guideline” as “a preferred or advisable course of action that is generally expected to be carried out. Deviation from compliance with a guideline does not require a Forest Plan amendment...” Ibid.

32. The RFP does not contain any enforceable standards for insuring the viability of fish and wildlife species, as required by the controlling NFMA regulations.

33. In fact, the RFP reduces wildlife biodiversity to a “goal,” and does not establish any standards for the protection of minimum amounts of mature sagebrush habitat or the insurance of sagebrush-associated species viability. RFP III-15 – III-23?.

34. A “goal” is defined by the RFP as “a concise statement that describes a DFC [Desired Future Condition, which are in turn defined as “broad target conditions envisioned for the Forest or various resources” which “may or may not be totally achieved”] which normally is expressed in broad, general terms that are timeless, in that there is no specific date by which each goal is to be achieved.” RFP III-2.

35. Sagebrush habitats generally have suffered the most drastic decline of all wildlife habitats in the United States. *Saab and Rich* (1997).

36. While the RFP designates numerous Management Indicator Species (“MIS”), it does so in a very general and indirect way. For example, it is not possible to determine what the MIS are without referring to Table III-16 in the RFP *Environmental Impact Statement*, and in spite of the historic degradation and destruction of sagebrush habitats, the RFP does not designate a MIS for sagebrush habitat.

37. Big sagebrush has been described as the “mother of [biological] diversity” (*Welch and Criddle* 2003), and the Forest Service has identified 57 species of mammals and 121 species of birds that use sagebrush ecosystems on the Targhee NF.

38. While the RFP does not designate a MIS for sagebrush habitat or the biological community of sagebrush obligates, two sagebrush obligates – the sage grouse and the pygmy rabbit – have been designated as sensitive species for the Caribou-

Targhee NF, indicating a “significant current or predicted downward trends in population numbers or density, or significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution” (excerpted from USFS web site), and another – the Brewer’s Sparrow – is considered a species of concern due to range-wide losses of sagebrush habitats.

39. In 1978, Forest Service wildlife expert Sara Johnson inventoried twenty sites from among seven different types of mountain big sagebrush habitats in the Targhee NF in the area of the proposed Berry Creek Prescribed Burn (Medicine Lodge Planning Unit) for the purpose of documenting wildlife uses of this habitat, and developed a series of management recommendations designed to protect sagebrush obligates, especially nesting songbirds like the Brewer’s Sparrow, from the adverse impacts of Forest Service management, including grazing by cows. (*Johnson 1978*).

40. *Johnson (1978)* recommended that 70% of limited, high value sagebrush habitats -- including habitat found in depositional areas, next to riparian areas, next to forested areas, and that found in moister areas -- be maintained in a mature condition (> 2 ft. high) with 30-40% canopy cover. For sagebrush habitats located on drier sites, it was recommended that 40% of the sagebrush stands be maintained in mature condition with a minimum of 30-40% canopy cover.

41. According to the professional opinion of Dr. Johnson submitted to the Forest Service in commenting on the Targhee RFP and the Berry Creek Prescribed Burn, the recommendations contained in *Johnson (1978)* would be considered too conservative in light of developing scientific knowledge and concern about the imperiled status of healthy sagebrush habitat and associated wildlife, and today she would recommend that

100% of productive mountain big sagebrush habitats be maintained in mature condition with high canopy coverage.

42. According the U.S. Fish & Wildlife Service, about half of all sagebrush habitat has been eliminated, and the other half has already been altered.<sup>2</sup> Once lost to fire, it takes many decades for the habitat to return, if at all. *Id.*

43. According to one of the most recent scientific studies by the Forest Service's Pacific Northwest Research Station (*USDA 2007*), hundreds of sagebrush obligate species are imperiled by a "slow death from a thousand cuts" (paraphrased), and only the most dedicated campaign of conservation and restoration can secure their future. The same report recommends an approach of "passive restoration," including changes in livestock management, active fire suppression, exotic plant management, and native seeding to restore native grasses and forbs in the understory of sagebrush habitats over a period of 3-5 decades. *Id.*

44. The Targhee RFP adopts an "active restoration" approach to managing sagebrush habitats, as compared to the recommendations set forth in *USDA (2007)*, *supra*.

45. Within big sagebrush grassland habitats, including the project area for the Berry Creek Prescribed Burn, the Targhee's 1997 RFP direction is to strive for the following conditions within a sagebrush subwatershed: 20% sagebrush with a canopy coverage of greater than 30%; 75% in a well distributed mosaic of canopy coverage of 5-30%; and 5% with less than 5% canopy coverage. *TNF RFP at p. III-13.*

46. In areas like Berry Creek, which are characterized by a relatively high preponderance of mature sagebrush habitat with high canopy coverage, these conditions are intended to be achieved through prescribed burns, based upon a burn cycle of twenty

(20) years. According to the FEIS for the TNF RFP, the agency anticipates burning an estimated 11,000 – 21,000 acres of mature sagebrush habitat during the first decade of implementing the RFP. FEIS at IV-5, IV-26.

47. Since it takes more than 20 years for sagebrush to redevelop and mature after burning, an active management program of prescribed burns based upon a burn cycle of 20 years runs a significant risk of eliminating mature sagebrush habitat over time.

48. Mountain big sagebrush habitat does not have to be burned for the purpose of restoration. See, e.g.: *Petersen (1995)*; *Welch and Criddle (2003)*; *USDA (2007)*.

49. The Berry Creek Prescribed Burn would burn 1,200 acres of sagebrush habitat and aspen in a 50:50 mosaic pattern, meaning approximately 600 acres would actually be burned, and is tiered to the desired conditions outlined in the Targhee RFP. Presently, the sagebrush habitat in this area is characterized by mature sagebrush with 45% canopy cover.

50. While the Berry Creek Prescribed Burn Area has historically been summer brood rearing habitat for sage grouse, the Forest Service has not surveyed the area for sage grouse occupancy and has not identified the sage grouse leks (mating grounds) associated with the habitat.

51. Based on a total of one day's surveying of approximately 1200 acres, the Forest Service determined that the pygmy rabbit was not present in the Berry Creek Prescribed Burn Area, and declined to identify levels of suitable habitat for the pygmy rabbit in this landscape or to consider the contributions of grazing to this absence.

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<sup>2</sup> <http://mountain-prairie.fws.gov/species/birds/sagegrouse/factsheet>

52. While the Berry Creek Prescribed Burn Area has historically been managed for livestock grazing, the Forest Service has not evaluated the impacts of grazing on sagebrush wildlife obligates.

53. The sagebrush habitat in the Berry Creek area is characterized as being in “poor health,” due to declines in forb production.

54. Pursuant to the Targhee RFP, sagebrush habitat with canopy cover over 15-30% is defined as “unhealthy rangeland in unsatisfactory ecological condition,” due in part to a lack of forbs and grasses under the sagebrush canopy. RFP FEIS at III-42, 46, IV-6, 27.

55. Livestock grazing has caused significant changes in plant species composition of sagebrush habitats, including impacts from loss of the cryptogram layer from trampling, loss of natural seral grasses, reduced perennial grass cover, reduced forb cover, and invasion of exotic species. *Saab et al. (1995)*.

56. Scientific and historic evidence indicates that livestock grazing has markedly reduced the herbaceous understory in sagebrush habitats over relatively large areas. *Connelly et al. (2000)*.

57. The Forest Service has a long-standing practice of burning sagebrush habitat to increase forage for livestock. See, e.g., *USDA (2007)*.

58. In a recent extensive review of sagebrush management literature, *Welch and Criddle (2003)* describe how many research reports or publications on this topic have been premised on unsupported assumptions, including assumptions that:

- High canopy cover in sagebrush results in low densities of grasses and forbs;
- Sagebrush canopy cover is normally very low;

- Removing sagebrush increases understory production and plant diversity;
- Sagebrush presence is an indicator of poor range condition;
- Mountain big sagebrush evolved with a fire frequency of 20-30 years;
- Sagebrush needs fire to maintain understory grasses and forbs;
- Sagebrush poisons adjacent plants.

59. There is no available monitoring data from either the Targhee NF or elsewhere in published literature demonstrating that the kind of burning proposed in the Berry Creek Prescribed Burn will benefit any wildlife species. In fact, *Peterson (1995)* concluded from a literature search of burning impacts on sage grouse that there is no clear evidence that burning benefits sagegrouse. Accord: *Welch and Criddle (2003)*.

60. While *Connelly et al. (2000)* identifies mosaic burning in mountain big sagebrush as a means for restoring sage grouse habitat, it does not cite to any studies where such burning actually was shown to increase sage grouse populations, and acknowledged that such a proposition requires further study and analysis.

61. Recommendations from *Connelly et al. (2000)* relative to burning sagebrush habitat include the recommendation *not* to burn landscapes containing significant breeding habitat for the sage grouse.

62. The Forest Service has either not surveyed the Berry Creek Prescribed Burn Area for the presence of sage grouse breeding habitat, or if it has conducted such surveys, it has not disclosed the results of same.

63. While both *Connelly et al. (2000)* and *Johnson (1978)* recommend identification of sagebrush habitats adjacent to riparian areas, timber stands, and

meadows for the purpose of protection prior to burning sagebrush landscapes, the Berry Creek Prescribed Burn does not follow this basic recommendation.

64. One significant risk to the environment that is associated with the failure to identify and protect sagebrush habitats adjacent to riparian areas, timber stands, and meadows prior to burning is that the densest patches of sagebrush will burn while the low density patches will not burn, due to difficulties in controlling the patch size and width of unburned areas in such operations.

65. The sagebrush habitat modification program recommended by the Targhee RFP, and implemented in the Berry Creek Prescribed Burn, is in conflict with U.S. Fish & Wildlife Service recommendations to minimize management impacts on “Birds of Conservation Concern” in the Northern Rockies, including the Ferruginous Hawk, Golden Eagle, Loggerhead Shrike, and Brewer’s Sparrow:

- Both the Ferruginous Hawk and Golden Eagle depend heavily on the black-tailed jackrabbit as prey, and burning sagebrush reduces the habitat of this prey species;
- Both the Loggerhead Shrike and Brewer’s Sparrow have suffered from long term persistent declines due in part to habitat losses, and both are closely associated with sagebrush habitat.
- Preservation of Idaho’s existing sagebrush rangelands, especially the largest sagebrush plants, will be important to the long term survival of the Loggerhead Shrike. *Woods and Cade (1996)*.
- The Brewer’s Sparrow selects large patches of dense sagebrush, and reductions in sagebrush canopy cover are associated with losses in habitat suitability for this species. *Petersen and Best (1985); Johnson (1978)*.

66. According to scientific literature reviews, sagebrush plants actually benefit the surrounding plant communities by providing shade that extends seed germination in the spring, protecting understory plants from grazing, increasing soil fertility at greater depths through root decay, increasing winter snow (water) storage, and increasing summer water availability to adjacent plants through hydraulic lift of deep soil moisture. *Peterson (1995); Welch and Criddle (2003).*

67. The Targhee RFP FEIS and supporting document Process Paper D both recognize that livestock grazing reduces grass and forb understories within sagebrush ecosystems.

68. Science developed specifically for the Targhee NF by their own biologist concluded from studying the impacts of grazing on sagebrush ecosystems that such grazing significantly reduces the diversity and density of small mammal species populations. *Johnson (1978).* The Targhee RFP FEIS did not assess the impacts of livestock grazing on the biological diversity of species, including small mammal diversity, associated with sagebrush ecosystems.

69. The Forest Service has had ample opportunity to study the impacts of sagebrush burning on wildlife species and diversity. For example, the Berry Creek Prescribed Burn references a similar prescribed burn in Meadow Creek completed in 2001 approximately ten miles from Berry Creek. However, the Forest Service failed to monitor the impact of that burn, or similar previous burns, on the preponderance and diversity of sagebrush associated wildlife species.

70. The Targhee RFP FEIS does not assess the cumulative impacts of grazing and burning sagebrush on the preponderance and diversity of sagebrush associated wildlife species.

71. While the Forest Service has not monitored the impacts of sagebrush burning on wildlife species in the Targhee NF, they have studied the impacts of prescribed burning in the Deer Creek landscape of the Gallatin NF, and concluded that such burning has a “highly significant impact” on neotropical migratory birds. *USDA* (1998).

72. The cumulative impacts of converting sagebrush habitats to other habitats and uses and prescribed burning of sagebrush ecosystems create enough uncertainty with regard to species viability to call into question the advisability of any burning whatsoever, according to at least one literature review. *Welch and Criddle* (2003).

73. While only 20% of the sagebrush habitat within a watershed is required to be maintained in a dense canopy cover condition under the Targhee RFP, a Memorandum of Understanding between the neighboring Beaverhead-Deerlodge NF and the Montana Department of Fish, Wildlife & Parks entered into in 1998 for the purpose of assuring that viable populations of wildlife species and the habitats that sustain them are maintained, requires that 75% of the sagebrush habitat be maintained in this dense condition. While this Memorandum of Understanding protects 50% of the sagebrush ecosystem in an “old growth” condition, defined as sagebrush that has not been subjected to large scale disturbances like fire for at least sixty (60) years, the Targhee NF adopts such a frequent burn frequency as to preclude the development of old growth sagebrush habitat.

74. Pursuant to the guidelines recommended in *Connelly* (2000), 80% of a sagebrush ecosystem should be maintained in a mature age class.

### **CLAIMS FOR RELIEF**

Plaintiffs incorporate all the above paragraphs into each of its claims for relief, as relevant and appropriate to that claim.

#### **FIRST CLAIM FOR RELIEF**

The RFP fails to “provide for diversity of plant and animal species” in accordance with 16 U.S.C. § 1604(g)(3)(B) and implementing regulations, as it does not set forth any enforceable, mandatory minimum requirements for maintaining viable populations of wildlife species associated with sagebrush ecosystems in the TNF.

#### **SECOND CLAIM FOR RELIEF**

The decision to approve the Berry Creek Prescribed Burn in accordance with the Targhee RFP was arbitrary and capricious and not in accord with NEPA, as the potential impacts on sagebrush obligates are uncertain at best, are controversial in light of the best available science, and represent potentially significant environmental impacts on the environment requiring preparation of an environmental assessment or environmental impact statement.

#### **THIRD CLAIM FOR RELIEF**

The decision to approve the Berry Creek Prescribed Burn in accordance with the Targhee RFP was arbitrary and capricious and not in accord with NEPA, as the conclusion that such burning benefits wildlife is an untested hypothesis that is not premised on a reliable model or the kind of actual monitoring required by NFMA, in spite of ample

opportunities to obtain such data, and as it does not represent the kind of special consideration for sensitive species like the sage grouse and pygmy rabbit required by law.

#### **FOURTH CLAIM FOR RELIEF**

The decision to approve the Berry Creek Prescribed Burn in accordance with the Targhee RFP was arbitrary and capricious and not in accord with NEPA, as it failed to consider the cumulative impacts of grazing, habitat conversion, and burning on sagebrush habitat and associated wildlife species.

#### **FIFTH CLAIM FOR RELIEF**

The decision to exempt the Berry Creek Prescribed Burn from further environmental analysis under NEPA was arbitrary and capricious, as it failed to consider the cumulative impacts of burning sagebrush habitat on sage grouse, a species proposed for Federal listing under the Endangered Species Act, because the possible effects of such burning are highly uncertain and/or involve unique or unknown risks to species viability, and because the Forest Service failed to adequately explain how the sagebrush burning program in the Targhee NF is consistent with the best available science.

#### **SIXTH CLAIM FOR RELIEF**

The decision to approve the Berry Creek Prescribed Burn in accordance with the Targhee RFP was arbitrary and capricious and not in accord with NEPA, as it failed to consider reasonable alternatives to burning sagebrush habitat that would potentially have less adverse or uncertain impacts on associated wildlife species, such as passive restoration including but not limited to reducing livestock grazing impacts or requiring higher levels

of dense, mature sagebrush to be maintained in accordance with approaches taken by other forests in the region.

### **SEVENTH CLAIM FOR RELIEF**

The decision to implement the Targhee RFP direction on sagebrush habitat manipulation in the Berry Creek Prescribed Burn was arbitrary and capricious and not in accord with NFMA, as it fails to provide adequate assurances for associated wildlife species by designating an appropriate range of management indicator species for sagebrush ecosystems, and disclosing the impacts of sagebrush ecosystem management on the populations of such appropriate indicator species.

### **REQUEST FOR RELIEF**

For all of the above reasons, Plaintiffs request that the Court:

A. Declare that the RFP is not in accord with the substantive requirements of NFMA

for any or all of the following reasons:

- 1) Failure to provide for diversity of wildlife communities based on the suitability and capability of specific habitat types;
- 2) Failure to insure research on an and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the TNF;

- 3) Failure to insure that sagebrush habitat will be burned and/or grazed on the TNF only where watershed conditions will not be irreversibly damaged; and,
- 4) Failure to insure consideration of the environmental aspects of various systems of forest management, including the protection of forest resources to provide for outdoor recreation, wildlife, and fish by considering a reasonable range of alternatives for managing sagebrush ecosystems.

- B. Declare that the RFP is not in accord with the procedural requirements of NEPA, due to the failure to fully disclose to the public the potential consequences of RFP implementation on sagebrush wildlife obligates, as well as the failure to respond to all the legitimate concerns of qualified experts raised by the public during RFP development and consideration of the Berry Creek Prescribed Burn, and the failure to adequately consider the potential environmental and economic consequences of implementing the RFP.
- C. Declare the decision to approve the Berry Creek Prescribed Burn arbitrary and capricious and otherwise not in accord with law, due to reliance on an unlawful forest plan and/or the failure to insure the viability of species and/or the failure to take a hard look at the environmental consequences of the challenged project.
- D. Declare the decision to approve the Berry Creek Prescribed Burn arbitrary and capricious and otherwise not in accord with law, due to the failure to prepare an environmental assessment or environmental impacts statement in accordance with NEPA.

- E. Enjoin the FS from taking any actions pursuant to the RFP that may adversely affect the sage grouse or pygmy rabbit until such time as either lawful conservation strategies are in place, or adequate viability assessments have been performed, and adequate protection standards have been put in place pursuant to Forest Plan amendments or revisions, to insure the viability of these species.
- F. Enjoin the FS from taking any actions pursuant to the RFP that may adversely affect sagebrush wildlife diversity until such time as adequate protection standards have been put in place pursuant to Forest Plan amendments or revisions, including but not limited to designation of appropriate management indicator species for the sagebrush biological community, to insure the viability of these species.
- G. Award plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under applicable law; and,
- H. Grant plaintiffs such further relief as may be just, proper, and equitable.

DATED this 19th day of March, 2008.

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